Supreme Court, U.S.
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No. 09-162

In The

Supreme Court of the United States

MICHAEL JAMES PERRY,

Petitioner,

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED FOR REVIEW

1. Under *Strickland v. Washington*,[1] *Williams v. Taylor*,[2] *Wiggins v. Smith*,[3] and *Rompilla v. Beard*,[4] were the reviewing courts required to measure the efforts of Perry's counsel against *specific* objective standards, such as those in the American Bar Association's *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, or was it sufficient for those courts to merely conclude that "Perry's counsel did [an] extensive investigation?"[5]

2. Could reasonable jurists debate whether Perry received effective assistance where his counsel proceeded to trial with "no idea" about his biological background, sought and obtained his adoption records only after jury selection had begun, turned down an offered continuance, then learned of his biological family's struggles with mental illness and substance abuse (including such abuse by his mother during pregnancy) only on the eve of his sentencing proceeding, too late to fully explore the extent of his biological family's "severe mental illness" and

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[1] 466 U.S. 668, 688 (1984).

[2] 529 U.S. 362, 396 (2000).

[3] 539 U.S. 510, 524-25 (2003).

[4] 545 U.S. 374, 387 (2005).

[5] App. 11.

QUESTIONS PRESENTED FOR REVIEW – Continued

substance abuse or conduct tests on Perry that would have revealed he suffers from bipolar disorder?

3. Could reasonable jurists debate whether Perry received effective assistance where his counsel introduced evidence of his history of alcohol and substance abuse at trial, but failed to put it into context with his mental illness and hereditary predisposition, and instead allowed that history to be used by prosecutors to portray him as unworthy of leniency?

4. Because Perry had tested negative for bipolar disorder years before his arrest, were his trial counsel relieved of any obligation to retest him or, under *Rompilla v. Beard*, were they duty bound to respond to "'red flags' pointing up a need to test further,"[6] despite such "reports [that] revealed 'nothing useful?'"[7]

5. Given that Perry's counsel never claimed a strategic reason for not subpoenaing his adoption file until trial, and the state reviewing courts did not ascribe any strategy to the subpoena's timing, was Perry obligated to disprove such a tactic was at work or be found to have "fail[ed] to raise an issue concerning counsel's mitigation strategy that is

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[6] 545 U.S. at 392.

[7] *Id.* at 382.

QUESTIONS PRESENTED FOR REVIEW – Continued

debatable among reasonable jurists,"[8] as the court of appeals concluded?

6. Under *Giglio v. United States*,[9] is the State required to disclose "evidence of any understanding or agreement as to . . . future prosecution"[10] with a witness, or only those assurances that rise to the level of an "immunity agreement," a formal arrangement under Texas procedure requiring not only a firm promise but also trial court approval?

7. Could reasonable jurists debate whether *Brady v. Maryland*[11] and *Giglio v. United States* required disclosure of the State's assurances of leniency to Victor Neal, an "important" sentencing witness, where prosecutors acknowledged making such promises in open court, elicited the witness's sworn confirmation of such promises in open court, and both the prosecutors and the state court obtained the witness's sworn admission of guilt in the burglary that was the subject of the assurances, again during open court?

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[8] App. 9.

[9] 405 U.S. 150 (1972).

[10] *Id.* at 154-55.

[11] 373 U.S. 83 (1963).

QUESTIONS PRESENTED FOR REVIEW – Continued

8. Did the court of appeals disregard *Miller-El v. Cockrell*[12] and its admonition against slavish deference to state court findings, when the court credited a finding that Neal was "merely present during the burglary"[13] for which he was promised leniency despite (i) Neal's sworn testimony to the contrary (the only sworn testimony on the subject), as elicited by the prosecutors and state court, (ii) Neal's sworn reaffirmation of that testimony during Perry's habeas proceedings, and (iii) the absence of any evidence ever introduced disproving that testimony?

9. Could reasonable jurists debate whether the State's acknowledged failure to disclose the assurances to Neal was prejudicial when Perry received the death penalty, but his co-defendant, who was tried subsequently and effectively impeached Neal with the prosecution's promises of leniency, received a life sentence?

10. If *Penry v. Lynaugh*[14] requires that a State's capital sentencing scheme *as applied* must allow a capital jury to give full consideration and full effect to a defendant's mitigation evidence, did Perry's prosecutors violate that mandate in committing his

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[12] 537 U.S. 322, 344 (2003).

[13] App. 13.

[14] 492 U.S. 302, 323 (1989).

QUESTIONS PRESENTED FOR REVIEW – Continued

jurors to a narrower understanding of the sentencing issues during *voir dire* and urging them to adhere to that narrower understanding during closing argument?

11. If *Brewer v. Quarterman*[15] and *Abdul-Kabir v. Quarterman*[16] forbid any "judicial gloss on a statute [that] prevents a jury from giving meaningful effect to mitigating evidence that may justify the imposition of a life sentence rather than a death sentence,"[17] did the same principles prohibit Perry's prosecutors from adding a gloss to the same effect through their *voir dire* and closing argument?

12. Can the State "expressly waive" exhaustion, as authorized by 28 U.S.C. § 2254(b)(3), only where the petitioner's habeas claim has already been fairly presented (i.e., exhausted) in the state courts?

13. Could reasonable jurists debate whether, under 28 U.S.C. § 2254(b)(3), the State's answer admitting Perry exhausted his claims waived the exhaustion requirement?

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[15] 550 U.S. 286 (2007).

[16] 550 U.S. 233 (2007).

[17] 550 U.S. at 289.

PARTIES TO THE PROCEEDING

The parties to the proceeding are **Michael James Perry**, an individual, and **Nathaniel Quarterman**, Director, Texas Department of Criminal Justice, Correctional Institutions Division.

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The Fifth Circuit's opinion, *Perry v. Quarterman*, No. 08-70017, slip op. (5th Cir. Mar. 11, 2009) (App. 1-18); the District Court's decision, *Perry v. Quarterman*, No. 4:07-cv-1032, slip op. (S.D. Tex. Feb. 22, 2008) (App. 19-120); the Findings of Fact, Conclusions of Law and Recommendation of the 221st Judicial District Court of Montgomery County, Texas, recommending denial of Perry's application for writ of habeas corpus, entered on August 22, 2005, in Cause No. 02-01-00320-CR-(1) (App. 121-67); and the Fifth Circuit's order denying Perry's petition for rehearing *en banc*, *Perry v. Quarterman*, No. 08-70017, slip op. (5th Cir. May 8, 2009) (App. 168-69) are all unpublished.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Fifth Circuit entered its judgment on March 11, 2009 (App. 1), and denied Perry's timely petition for rehearing *en banc* on May 8, 2009 (App. 168). This petition is timely filed.

CONSTITUTIONAL PROVISIONS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall

have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST., amend. VI.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CONST., amend. VIII.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST., amend. XIV, § 1.

ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 PROVISIONS

Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective

jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

28 U.S.C. § 2241(a).

The writ of habeas corpus shall not extend to a prisoner unless –

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States[.]

28 U.S.C. § 2241(c).

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(e)(1).

TEXAS' CAPITAL SENTENCING STATUTE

The court shall charge the jury that:

(1) in deliberating on the issues submitted under Subsection (b) of this article, it shall consider all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty;

(2) it may not answer any issue submitted under Subsection (b) of this article "yes" unless it agrees unanimously and it may not answer any issue "no" unless 10 or more jurors agree; and

(3) members of the jury need not agree on what particular evidence supports a negative answer to any issue submitted under Subsection (b) of this article.

TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(d).

The court shall instruct the jury that if the jury returns an affirmative finding to each issue submitted under Subsection (b), it shall answer the following issue:

Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.

TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(e)(1).

STATEMENT OF THE CASE

Perry was born to a seventeen-year old,[18] who gave him up for adoption the day after he was born.[19] His biological mother did not disclose her drug and

[18] 25 R.R. 114:19-21.

[19] *Id.* at 114:13-16; *see also* 26 R.R. 196:21-198:1 & USCA5 2152.

alcohol use while pregnant with Perry, nor did she tell the adoption agency about her mental health problems or the extensive problems suffered by her family.[20] Perry's adoptive parents had no contact with – and knew almost nothing about – Perry's birth mother.[21]

Perry's behavioral problems began as early as eighteen months with severe temper tantrums.[22] After first grade, his teacher recommended that he receive psychological testing and he was diagnosed with attention deficit disorder.[23] As a result, he was given a commonly prescribed stimulant and placed in counseling.[24] By junior high, Perry had been diagnosed with personality disorders, including oppositional defiant disorder and conduct disorder.[25]

At the age of fifteen, his adoptive parents placed him in Boys Town[26] and later a program in Mexico.[27] But he quit when he turned eighteen and made his way back to Texas,[28] where he moved in with Jason

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[20] 25 R.R. 132:13-133:14, 137:1-138:2; *see also* 26 R.R. 197:19-200:10 & USCA5 2155.

[21] 25 R.R. at 132:9-133:14, 137:1-21, 140:2-4; 26 R.R. 197:19-200:10.

[22] 26 R.R. 203:14-24 (testimony of James Perry).

[23] *Id.* at 17:20-19:1.

[24] *Id.* at 19:12-20.

[25] *Id.* at 28:8-12.

[26] *Id.* at 32:5-22.

[27] *Id.* at 35:8-24.

[28] 26 R.R. 43:7-45:22.

Burkett[29] and Victor Neal.[30] While living together, the trio burglarized a house.[31]

In late October 2001, Sandra Stotler was shot to death in her home in Conroe, Texas.[32] Her teenage son and one of his friends also were shot and killed in an isolated field a few miles from the house.[33] Perry was arrested, along with Jason Burkett.[34] Their roommate Victor Neal was neither arrested nor implicated in the murders. Perry confessed to shooting Sandra Stotler and was charged with capital murder in her death.[35] Burkett was charged with capital murder in the deaths of the two boys.[36] Perry and Burkett were tried separately.[37]

Counsel's Mitigation Investigation and Its Consequences. At the beginning of jury selection, Perry's counsel subpoenaed Perry's adoption records.[38] Three days later, the adoption agency brought the sealed records to court.[39] Perry's trial counsel

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[29] 24 R.R. 217:1-9 (testimony of Victor Neal).

[30] *Id.* at 216:17-217:9.

[31] *Id.* at 221:9-222:23.

[32] App. 2-3.

[33] App. 3-4.

[34] App. 4.

[35] App. 2.

[36] *Id.*

[37] App. 36.

[38] App. 9.

[39] 5 R.R. 31:19-32:11.

explained their need for access to the records to the trial court:

> Your Honor, as part of the defense we have no idea about the birth history of Mr. Perry's natural mother. It goes to mitigation. She might be in a psychiatric facility right now. She might be nuts. Her mother might be nuts. Her grandmother might be nuts. In order to do a true and effective part of the defense we have to know everything about Mr. Perry that we can.[40]

The records were unsealed and provided to Perry's trial counsel, who forwarded them to Dr. Gilda Kessner, a psychologist who often testifies in capital cases as a mitigation expert.[41] Though offered a continuance (for reasons unrelated to the adoption records), Perry's trial counsel turned it down.[42] Thus, Dr. Kessner's work ran parallel with Perry's trial.

The adoption records pointed her to Perry's biological mother and grandfather, and she interviewed them.[43] On February 25, 2003, she faxed a two page summary of what she learned to Perry's trial counsel.[44] This letter disclosed that Perry's biological family had a history of substance abuse, and "severe

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[40] *Id.* at 34:21-35:3.

[41] USCA5 2148 & USCA5 2357.

[42] USCA5 2356.

[43] USCA5 2148; *see also* 26 R.R. 92:5-9.

[44] USCA5 2148.

mental illness," and she alerted trial counsel to the possibility Perry was the victim of fetal alcohol syndrome ("teratogenic [developmental malformation] risk" was her phrase).[45] But, after trial counsel's tardy subpoena of the records and refusal of the offer for continuance, there was no time to investigate the implications of this information or to test Perry – Dr. Kessner was to be on the stand in just two days.[46]

Dr. Kessner's late access to the adoption records and to Perry's biological family meant the jury heard a troubling but far from complete account of their struggles. Moreover, while the jury heard of Perry's mother's drinking and drug abuse during pregnancy, the causal link to Perry's history of erratic and occasionally violent behavior remained uncertain and vigorously challenged in cross-examination.[47]

Thus the State's closing argument dismissed this information. "All these medical records, all the testimony, it all boiled down to one thing. . . . [o]ne common diagnosis for the most part," according to the prosecution.[48] That diagnosis was "[n]ot mental illness, not psychoses, but conduct disorder."[49] In other words, despite the love and affection of his adoptive parents, Perry "just flat out refused to be

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[45] *Id.*

[46] *Id.*; 26 R.R. 79:8-17.

[47] 26 R.R. 145:1-152:3, 186:5-187:2.

[48] 27 R.R. 57:12-15.

[49] *Id.*

good. He liked being oppositional. He liked being defiant."[50]

A more accurate and complete explanation for Perry's behavior came only after he was on death row. Prison psychiatrist evaluations found Perry is bipolar.[51] Further tests confirmed the diagnosis and determined the organic disorder had a "pediatric onset."[52]

With adequate time, Dr. Kessner would have learned, as would the jury, that Perry was hereditarily predisposed to mental illness and substance abuse:

- Perry's maternal grandmother suffered from depression, requiring medication, his maternal grandfather was a severe alcoholic who exhibited signs of depression and attempted suicide, and three maternal great aunts had serious problems, with one institutionalized twice for mental illness another has a history of depression and suicidal ideation, and the third has a life-long history of depression.[53] One of Perry's aunts was hospitalized for mental illness, repeatedly attempted suicide, and is a life-long substance abuser whose erratic behavior included violent episodes.[54]

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[50] *Id.* at 62:6-8.

[51] USCA5 2153; *see also* USCA5 936.

[52] USCA5 2154.

[53] USCA5 1487-88; 25 R.R. 167:12-168:7.

[54] 25 R.R. 160:11-161:8 & USCA5 1161.

- Perry's half-sister was hospitalized for depression, mood disorder, and suicide attempts, and his half-brother was placed on stimulation medications for attention deficit disorder, which produced side effects suggesting a misdiagnosis or a co-occurring mood disorder.[55]

- Two cousins were hospitalized for psychiatric reasons, another cousin was diagnosed with bipolar disorder and other mental illnesses, as well as substance use disorder, all of which result in her becoming violent if not medicated, four other cousins have long histories of substance abuse, and another was hospitalized in a psychiatric facility for depression after a history of behavioral problems, including violent outbursts.[56]

Victor Neal and His Testimony at Perry's Sentencing. During sentencing, Perry's other former roommate, Victor Neal, took the stand. What the jury heard from Neal was something they would not hear or read in Perry's confessions or in any of the other testimony – chilling evidence of Perry's premeditation as Neal painted the picture of Perry and Burkett, lying-in-wait, planning to not only steal cars but kill the owner. Neal testified Perry carried a shotgun every day "[s]o when they stole cars and stuff it was ready to go."[57] He recounted driving with Perry and

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[55] 25 R.R. 149:9-150:15, 152:3-6 & USCA5 1161.

[56] USCA5 1488; USCA5 1486; 25 R.R. 164:5-165:8; & USCA5 1487.

[57] 24 R.R. 218:25-219:1.

Burkett to malls, Wal-Mart, and apartment complexes (bringing their loaded gun) to look for cars to steal.[58] He recited that Perry and Burkett's plan was to not only steal the car but then "[g]et rid of the driver . . . [l]ike killing them."[59] He recalled how that plan took them to Crater Lake where they "talked about how you could stick bodies, cars, or anything that you didn't want to never be found, stick it in there and it won't ever come back up."[60]

Neal portrayed Perry as a serial criminal, involved in everything from drug distribution to a drive-by shooting.[61] At the conclusion of the sentencing phase, the prosecution argued it had proven Perry was responsible for thirteen crimes that should be taken into account in the jury's sentencing decision.[62] Of those, five related to the Stotler murders themselves and associated crimes.[63] Neal's testimony was central to the State's case regarding the majority of the other alleged crimes.[64]

The prosecution emphasized the central role of Neal's testimony during the sentencing phase closing arguments, referring to Neal as an "important

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[58] *Id.* at 228:23-232:10.

[59] *Id.* at 230:6-9.

[60] *Id.* at 232:17-22.

[61] *Id.* at 220:4-225:25.

[62] 27 R.R. 18:9-21:14.

[63] *Id.* at 18:11-19:21.

[64] *Id.* at 20:7-21:5.

witness" and "a very believable witness"[65] because "[i]f anybody knows Michael Perry's true side, it is Mr. Victor Neal."[66] And the prosecution pointed to his supposed trustworthiness as the reason to conclude "beyond a reasonable doubt" that Perry had committed the other crimes Neal cited and thus deserved a death sentence.[67]

Perry's jury should have heard that Neal's most damning testimony came only after he received assurances from the State that he would not be prosecuted for burglary.[68] Those assurances came to light only in the later trial of Burkett, and Burkett's counsel put the information to good use challenging Neal's credibility.[69] In particular, Burkett's defense obtained not only Neal's acknowledgement of his arrangement with the prosecutors and its importance to him, but also that his account of events evolved over time as the prosecutors pressed him.[70] Indeed, it was only after the prosecutors assured Neal of his safety from prosecution that he added his damning portrayal of Perry.[71]

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[65] *Id.* at 20:8-9, 18-19.

[66] *Id.* at 20:9-10.

[67] *Id.* at 18:11, 20:7-21:5.

[68] 17 Burkett R.R. 291:3-297:22.

[69] *Id.*

[70] *Id.* at 276:8-281:13, 288:10-13, 292:3-7.

[71] 18 R.R. 268:24-269:5.

ARGUMENT

A. Perry's Burden in the Court of Appeals Was Not to Show Entitlement to Relief, But Merely that Reasonable Jurists Could Debate the Issues He Had Raised.

Perry's habeas petition is subject to the requirements of Antiterrorism and Effective Death Penalty Act of 1996 (***AEDPA***).[72] One such requirement is a certificate of appealability (***COA***) in order to appeal a district court's denial of habeas relief.[73] To obtain a COA, Perry was obligated to make "a substantial showing of the denial of a constitutional right"[74] by demonstrating that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'"[75]

The COA assessment is limited to an examination that "requires an overview of the claims in the habeas petition and a general assessment of their merits," rather than a "full consideration of the factual or legal bases adduced in support of the

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[72] *See* 28 U.S.C. § 2254.

[73] 28 U.S.C. § 2253(c).

[74] *Slack v. McDaniel*, 529 U.S. 473, 483 (2000) (quoting 28 U.S.C. § 2253(c)).

[75] *Id.* at 483-84 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

claims"[76] or the ultimate merits.[77] Thus, the procedural threshold for obtaining a COA is lower than the standard for ultimate relief,[78] and, because the death penalty is at stake, "any doubts as to whether a COA should [be] issue[d] must be resolved in [Perry's] favor."[79]

B. The Fifth Circuit's Rejection of Perry's Ineffective Assistance of Counsel Claim Conflicts with this Court's Clearly-Established Precedent and Diverges from Other Circuit Courts.

Under *Strickland v. Washington*, a habeas petitioner must show that (i) his trial counsel's performance was deficient and (ii) the deficiency resulted in prejudice. Counsel's performance is measured against an objective standard of "reasonableness under prevailing professional norms."[80] The circuit court's application of this two-prong test is contrary to this court's controlling precedent, and at odds with the

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[76] *See Miller-El v. Cockrell*, 537 U.S. 322, 336-337 (2003).

[77] *Id.* at 342 ("Before the issuance of a COA, the Court of Appeals had no jurisdiction to resolve the merits of petitioner's constitutional claims.").

[78] *Id.* at 338, 342 ("a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.").

[79] *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir. 2000).

[80] 466 U.S. 668, 688 (1984).

emerging consensus regarding the importance of mental health evidence.

The Circuit Court Refused to Acknowledge the Pertinent ABA Guidelines or Apply Any Objective Measure. In *Strickland v. Washington*,[81] *Williams v. Taylor*,[82] *Wiggins v. Smith*,[83] and *Rompilla v. Beard*,[84] this Court relied on the American Bar Association's *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (***ABA Guidelines***)[85] to assess the effectiveness of a capital defendant's trial counsel. The ABA Guidelines confirm that *when* a defense attorney begins to investigate is important, perhaps pivotal. Procrastination often results in prejudice.[86]

Leaving Perry's adoption records to trial was objectively unreasonable when measured against

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[81] *Id.* at 688.

[82] 529 U.S. 362, 396 (2000).

[83] 539 U.S. 510, 524-25 (2003).

[84] 545 U.S. 374, 387 (2005).

[85] ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 HOFSTRA L. REV. 913, 1022 (rev. ed. Feb. 2003) (hereinafter "***2003 ABA Guidelines***").

[86] *See, e.g.*, *Williams v. Taylor*, 529 U.S. 362, 395 (2000) (finding ineffective assistance of counsel where "[t]he record establishe[d] that counsel did not begin to prepare for [the sentencing] phase of the proceeding until a week before the trial" and failed to uncover mitigation evidence).

"prevailing professional norms."[87] The ABA Guidelines confirm as much:

- They highlight the vital importance of mental health evidence in the punishment phase and point out the investigation for such potential evidence "begins with the moment of [the capital defendant's] conception,"[88] in part because "[m]any [defendants'] problems start with things like fetal alcohol syndrome, head trauma at birth, or their mother's addiction during pregnancy."[89]

- They emphasize that looking into such possibilities as well as other potential mitigating factors "should begin *as quickly as possible*, because it may affect [among other matters] decisions about the need for expert evaluations."[90]

- They explain the importance of obtaining Perry's adoption records[91] well before trial because only then could his attorneys or Dr. Kessner inquire "as far as possible vertically and horizontally,"[92] looking for a "family history of mental illness [or] substance abuse,"[93] in order to determine

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[87] *Strickland*, 466 U.S. at 688.

[88] 2003 ABA Guidelines, 31 HOFSTRA L. REV. at 1022.

[89] *Id.* at n.211 (citation omitted).

[90] *Id.* at 1023 (10.7 Commentary) (emphasis added).

[91] *Id.* at 1025 (listing birth records as part of the investigation process) & 1022 (pointing to the need for pre-natal medical history).

[92] *Id.* at 1025; *see also id.* at n.216 (approving an investigation into at least three generations of the defendant's family).

[93] *Id.* at 1022.

whether there are "significant patterns of family dysfunction [that] . . . underscore the hereditary nature of a particular impairment."[94]

- They note "[i]t is necessary to locate and interview the client's family members . . . who may suffer from some of the same impairments as the client. . . ."[95]

Unable to explain how Perry's counsel's inaction can be squared with any of the ABA Guidelines, the court of appeals failed to acknowledge, much less address, them.[96] And the court of appeals did not muster any reason for concluding "the quoted standard[s from the ABA Guidelines] impertinent" to assessing Perry's counsel.[97]

The Circuit Court's Decision Is Contrary to Rompilla v. Beard. The generalities and justifications the court of appeals invoked in lieu of applying the ABA Guidelines are contrary to this Court's decision in *Rompilla v. Beard*. Trial counsel likewise "did [an] extensive investigation"[98] in interviewing five of Rompilla's family members, and they employed three experts who examined Rompilla's mental health at the time of the offense.[99] They failed, however, to obtain and review a prior conviction file, despite

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[94] *Id.* at 1025.

[95] *Id.* at 1024.

[96] App. 10-11.

[97] *Rompilla v. Beard*, 545 U.S. at 387 (footnote omitted).

[98] App. 11.

[99] 545 U.S. at 381-82.

notice the prosecution planned to present a transcript from it during the ensuing sentencing proceedings.[100]

This Court found that Rompilla's trial counsel failed their duty to investigate because it was "common sense" to look at a file the prosecution planned to use[101] and the ABA Guidelines require a "prompt investigation" of such materials.[102] The Court found "beyond any doubt that counsel's lapse was prejudicial."[103] The leads in the unreviewed file included evidence Rompilla's mother "drank during her pregnancy . . . , and [that Rompilla] and his brothers eventually developed serious drinking problems."[104] These and other "red flags" pointed Rompilla's post-conviction mental health experts to the "need to test further,"[105] and, when they did so, they found Rompilla "suffer[ed] from organic brain damage,"[106] a condition that "relate[d] back to his childhood" and was "likely caused by fetal alcohol syndrome."[107] Furthermore, the file also pointed them

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[100] *Id.* at 384.

[101] *Id.* at 386-87.

[102] *Id.* at 387 (quoting 1 ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.1 (2d ed. 1982 Supp.)).

[103] *Id.* at 390.

[104] *Id.* at 391-92.

[105] *Id.* at 392 (quoting *Rompilla v. Horn*, 355 F.3d 233, 279 (3d Cir. 2004) (Sloviter, J., dissenting)).

[106] *Id.*

[107] *Id.* (quoting 355 F.3d at 280 (Sloviter, J., dissenting)).

to "several members of Rompilla's family, whom trial counsel did not interview."[108]

In the same way that the prosecution's announced intention to rely on a portion of the prior conviction file made it incumbent on Rompilla's counsel to review that file, so too did Perry's adoption and life-long behavioral issues make it essential to review his adoption file. Indeed, his trial counsel acknowledged as much to the trial court. Whether prior tests failed to uncover Perry's bipolar disorder is beside the point; all that matters is that trial counsel failed to timely review an unquestionably relevant file.[109]

As in *Rompilla*, timely review of Perry's adoption file would have alerted trial counsel to "a range of mitigation leads that no other source had opened up."[110] With a complete picture of Perry's biological family, "red flags" pointing to the need to run the tests that would uncover an explanation for the causes and consequences of Perry's own alcohol and substance abuse, the jury would have heard a much different explanation for his behavioral history than what emerged at trial. Such a rebuttal could have caused at least one juror to strike a different balance in weighing the aggravating and mitigating evidence. Thus, this Court's decisions, as well as the decisions

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[108] *Id.* at 391.

[109] *Id.* at 389-90.

[110] *Id.* at 390.

of other circuits, hold that an attorney who foregoes such an investigation fails to adhere to objective standards of reasonableness.[111]

The Circuit Court Afforded Deference to a Non-Existent Strategy. The circuit court's reliance on *Strickland*'s deference is no answer for counsel's inaction.[112] That deference protects "informed strategic choices" from the "distorting effect of hindsight."[113] It is no protection at all for outright omissions,[114] Perry's attorneys have never claimed any tactical reason for waiting until trial to investigate his

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[111] *See, e.g., Haliym v. Mitchell*, 492 F.3d 680, 712 (6th Cir. 2007) (finding counsel ineffective for failure to follow up on obvious avenues of investigation that would have produced *valuable* mitigating evidence, including a *potential* mental defect); *Summerlin v. Schriro*, 427 F.3d 623, 630 (9th Cir. 2005) (stating the importance of investigating and presenting evidence of mental impairment); *Wallace v. Stewart*, 184 F.3d 1112, 1117 (9th Cir. 1999) (stating that "[e]vidence of mental problems may be offered to show mitigating factors in the penalty phase, even though it is insufficient to establish a legal defense . . . in the guilt phase," we said that "where counsel is on notice that his client may be mentally impaired, counsel's failure to investigate his client's mental condition as a mitigating factor in a penalty phase hearing, *without a supporting strategic reason*, constitutes deficient performance.") (quoting *Hendricks v. Calderon*, 70 F.3d 1032, 1043 (9th Cir. 1995)) (emphasis added).

[112] App. 8.

[113] *Strickland*, 466 U.S. at 689-90.

[114] *See Rompilla v. Beard*, 545 U.S. at 395-96 ("They did not learn at the 11th hour about the prosecution's intent to use the prior conviction, ... Rather, their failure to obtain the crucial file 'was the result of inattention, not reasoned strategic judgment.'") (quoting *Wiggins v. Smith*, 539 U.S. 510, 534 (2003)).

biological history.[115] Consequently, neither the federal district court nor the state court found any strategy was at work.

The Circuit Court Ignored the Importance of Mental Health Evidence and the Powerful Impact Perry's Bipolar Disorder Could Have Had on His Sentencing. Perry's bipolar disorder, with its seeming biological link, "is exactly the sort of evidence that garners the most sympathy from jurors."[116] As the Tenth Circuit recently explained, mental illnesses are fundamentally different from personality disorders:

> Diagnoses of specific mental illnesses such as schizophrenia or *bipolar*, which are associated with abnormalities of the brain and can be treated with appropriate medication, are likely to [be] regarded by a jury as more mitigating than generalized personality disorders, which are diagnosed on the basis of reported behavior, are generally inseparable from personal identity, and are often untreatable through medical or neurological means.[117]

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[115] *See* USCA5 2351-59 & USCA5 2361-2366.

[116] *Smith v. Mullin*, 379 F.3d 919, 942 (10th Cir. 2004) (citing both empirical evidence and case law); *see also Williams v. Taylor*, 529 U.S. at 398; *Wiggins*, 539 U.S. at 535.

[117] *Wilson v. Sirmons*, 536 F.3d 1064, 1094 (10th Cir. 2008) (emphasis added); *see also Smith v. Mullin*, 379 F.3d at 942 (juries respond to evidence of mental illness); *Middleton v. Dugger*, 849 F.2d 491, 495 (11th Cir. 1988) ("psychiatric evidence

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The prosecution recognized that distinction and seized on it. In closing argument, the prosecutor argued: "All these medical records, all the testimony, it all boiled down to one thing. One common diagnosis for the most part. Conduct disorder. *Not mental illness*, not psychoses, but conduct disorder."[118] Because there was no diagnosis of bipolar disorder, nor a complete picture of Perry's biological background, the prosecution was able to paint Perry as the product of a good family who "just flat out refused to be good," "liked being oppositional," and "liked being defiant."[119]

If Perry's trial counsel had hired an expert to test his mental health, the jury would have heard a powerful alternative explanation. They would have heard that, rather than choosing to be bad, Perry was predestined to inappropriate or even criminal behavior, not only as a result of his mental illness, but also the lack of information about its biological roots, which prevented early diagnosis and treatment.[120] The jury would have heard that the failure to diagnose Perry's bipolar disorder when he was younger led doctors to rely on stimulants, which often worsen the effects of the disorder in children and adolescents.[121] The jury would also have heard how

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. . . has the potential to totally change the evidentiary picture by altering the causal relationship that can exist between mental illness and homicidal behavior").

[118] 27 R.R. 57:12-21 (emphasis added).

[119] *Id.* at 62:3-8; *see also id.* at 21:19-22:2; 59:4-5; 59:11-12.

[120] USCA5 2155 & USCA5 2063-88.

[121] USCA5 2154.

those with bipolar disorder often "self-medicate," becoming alcoholics and substance abusers in the process.[122] In short, the jury would have heard that Perry is less culpable for his actions than the ordinary defendant because his mental illness was never treated appropriately,[123] though there are effective medications available.[124]

As this Court's decisions underscore, mental illnesses and other serious mental problems are persuasive mitigating evidence.[125] The court of appeals diverges from that clearly established precedent, as well as other circuit courts that consistently find prejudice where undiscovered evidence of mental illness offers an alternative explanation for the prosecution's sentencing theory.[126]

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[122] USCA5 2154, USCA5 2128-33 & USCA5 2090-98.

[123] USCA5 2156 & USCA5 1462.

[124] USCA5 2156.

[125] *See, e.g., Williams v. Taylor,* 529 U.S. at 398, 419 (concluding the undiscovered evidence of an abusive childhood and borderline mental retardation may have "influenced the jury's appraisal of his moral culpability" even though the petitioner had engaged in a life-long crime spree, and the State had presented "strong evidence that [he] would continue to be a danger to society, both in and out of prison."); *Eddings v. Oklahoma,* 455 U.S. 104, 114-15 (1982) (evidence of mental conditions, disorders and disturbances are the kinds of facts which may be considered by a jury as mitigating evidence).

[126] *See, e.g., Antwine v. Delo,* 54 F.3d 1357, 1368 (8th Cir. 1995) (finding prejudice where counsel failed to investigate fully defendant's mental condition and did not present evidence of defendant's bipolar disorder and the corresponding possibility

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As shown above, effective trial counsel would have been able to explain to the jury how Perry's biological background, bipolar disorder, and drug and alcohol abuse made him less culpable, possibly causing at least one juror to weigh the aggravating and mitigating factors differently.

C. The Circuit Court Incorrectly Ruled that the State Court's Holding on Perry's *Brady* Violation Was Not an Unreasonable Application of this Court's Clearly Established Precedent.

The State does not dispute that assurances were made to Neal before he testified at Perry's trial.[127] Following this Court opinions in *Giglio v. United States*[128] and *Napue v. Illinois*,[129] circuit courts have emphasized that such assurances regarding future prosecution – even if they do not rise to the level of a

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that he was "in the throes of a manic episode during the offense"); *Silva v. Woodford*, 279 F.3d 825, 847 (9th Cir. 2002) (finding prejudice where counsel failed to investigate defendant's childhood, mental illnesses, organic brain disorders and substance abuse).

[127] *Compare* App. 13 (noting that the State admits that the prosecutors assured Neal that they were not interested in him) with Neal Statement (stating that the prosecution specifically told him that anything he testified about would not be used against him, nor would he be prosecuted for his role in the burglary) App. 170.

[128] 405 U.S. 150, 154-55 (1972).

[129] 360 U.S. 264, 271 (1959).

formal immunity agreement – trigger the prosecution's duty to disclose under *Brady*.[130] The circuit court therefore ignored controlling federal law in finding otherwise.

The Circuit Court Refused to Acknowledge that Neal Could Have Been Prosecuted for His Role in the Burglary. Perhaps recognizing controlling precedent compelled the conclusion that *Brady*'s obligations were triggered by the prosecution's assurances, the circuit court relied on the state court finding that "the evidence was insufficient to prove that Neal was more than merely present during

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[130] *See Tassin v. Cain*, 517 F.3d 770, 777, 778, 780 (5th Cir. 2008) (stating that a witness deal "need not have been a 'firm promise' to trigger *Brady*," and even "[a] promise is unnecessary"); *Douglas v. Workman*, 560 F.3d 1156, 1186 (10th Cir. 2009) (concluding that *Brady* requires disclosures of tacit agreements between the prosecutor and a witness); *Bell v. Bell*, 512 F.3d 223, 233 (6th Cir. 2008) (stating that less formal, unwritten, or tacit agreements are also subject to *Brady*'s disclosure mandate); *Wisehart v. Davis*, 408 F.3d 321, 323-24 (7th Cir. 2005) (recognizing that express and tacit agreements are both agreements that are useable for impeachment and must therefore be disclosed); *Clay v. Bowersox*, 367 F.3d 993 (8th Cir. 2004) (noting that due process requires a prosecutor to disclose *any* promise that a key witness will not be prosecuted if he testifies for the state) (emphasis added); *United States v. Shaffer*, 789 F.2d 682, 690 (9th Cir. 1986) (finding that facts which imply an agreement also bear on the witness's credibility and must be disclosed); *Haber v. Wainwright*, 756 F.2d 1520, 1523-24 (11th Cir. 1985) (stating that even a prosecutor's "advice" can violate *Brady*); *DuBose v. Lefevre*, 619 F.2d 973, 979 (2d Cir. 1980) (noting that *Brady* may not be avoided by keeping a deal "general in language or tone").

the burglary."[131] Of course, Neal was not on trial, so his *guilt* cannot be determined from the record before the circuit court. The question is whether Neal could have been prosecuted for his role in the burglary. Based on Neal's own statements, as repeated by the circuit court,[132] the fact that he waited in the getaway car while Perry and Burkett committed the burglary would suffice to expose him to prosecution as a lookout.[133] Indeed, when questioning Neal during Burkett's trial the prosecutor referred to him as the "lookout" for the burglary.[134] Thus, the circuit court's depiction of Neal as "an innocent witness"[135] is refuted by the record.

The Prosecution's Failure to Comply with Its Brady Obligations Was Prejudicial. The circuit court also relies on the state court finding that, "even without Neal's testimony, 'the evidence of [Perry's] guilt is overwhelming.'"[136] But the question was not Perry's guilt or innocence; rather, the question was the impact Neal's testimony had on Perry's *sentencing*. The circuit court, however, like the federal

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[131] App. 13.

[132] App. 12.

[133] *See Rollerson v. State*, 227 S.W.3d 718, 726 (Tex. Crim. App. 2007) ("Even if appellant was only a 'lookout' (or one of several burglars) he is still guilty of the offense of burglary.").

[134] 17 Burkett 294:9-295:1 ("Q [prosecutor Bartlett]: You were a look-out; is that correct, sir? A.: Yes, sir. That's correct.").

[135] App. 14.

[136] App. 13-14.

district court[137] and state court[138] before it, did not address the impact of the *Brady* violation on that phase. Thus, the matter of prejudice in sentencing is reviewed *de novo*.[139]

That assessment is made on the basis of the evidence's materiality "*to punishment*, irrespective of the good faith or bad faith of the prosecution."[140] Undisclosed *Brady* evidence is material if there is a reasonable probability that, had the evidence been disclosed, the results of the proceeding would have been different.[141] "A 'reasonable probability of a different result' is shown when the suppression 'undermines confidence in the outcome of the trial.'"[142] Neal's chilling portrait of Perry as a cold-blooded killer, lying in wait at malls and apartment complexes, intent on murdering someone in order to steal a car[143] and the State's emphasis on Neal's importance undermines confidence in the outcome

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[137] USCA5 3004 & USCA5 3050-51.

[138] USCA5 938.

[139] *Rompilla v. Beard*, 545 U.S. 374, 390 (2005) (*de novo* review of the prejudice prong required where the state court did not address prejudice).

[140] *Brady*, 373 U.S. 83, 87 (1963).

[141] *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *United States v. Bagley*, 473 U.S. 667, 682 (1985).

[142] *Graves v. Dretke*, 442 F.3d 334, 340 (5th Cir. 2006) (quoting *Kyles*, 514 U.S. at 434); *see also Bagley*, 473 U.S. at 682.

[143] 24 R.R. 228:1-232:10; 18 R.R. 260:15-261:8.

that resulted from the prosecution's *Brady* violation.[144]

D. The Reviewing Court's Dismissal of Perry's Challenge to Texas' Statutory Mitigation Instruction and Issue, As Applied in His Sentencing, Conflicts with this Court's Clearly Established Precedent.

During the *voir dire* of individual jurors, the prosecution urged that Texas' mitigation issue and instruction requires a nexus between the defendant's mitigation evidence and the crime. In words that echo the circuit court's now defunct "constitutional relevance" test, the prosecutors sought the jurors' acceptance of, and agreement to, that supposed requirement, they cross-examined Perry's mitigation witnesses as though the issue and instruction required such a causal link, and they urged the jury to ignore Perry's mitigation evidence on the grounds that it fell short of this invalid standard. In permitting the prosecutors to add this gloss, the circuit court disregarded *Penry v. Lynaugh*'s[145] guarantee that a capital jury "be able to give *full* consideration and *full* effect to a defendant's mitigating evidence."[146]

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[144] *See supra* at 11-13.

[145] 492 U.S. 302 (1989).

[146] *Nelson v. Quarterman*, 472 F.3d 287, 298 (5th Cir. 2006) (en banc) (emphasis in original).

The "Reasonable Likelihood" Test. Under *Penry*'s "full-effect" standard,[147] "the proper inquiry" in determining whether constitutional guarantees have been breached is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence."[148] A petitioner is not required to show a *probability* "the jury was prevented from giving effect to the evidence, [but] the standard requires more than a mere possibility of such a bar."[149] In making a likelihood assessment, a reviewing court is to look at the jury instructions as a whole, considered in combination with the prosecutor's *voir dire* and closing argument.[150] That

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[147] *Id.* at 301.

[148] *Scheanette v. Quarterman*, 482 F.3d 815, 826 (5th Cir. 2007) (internal quotations omitted).

[149] *Johnson v. Texas*, 509 U.S. 350, 367 (1993) (the "standard does not require that the defendant prove that it was more likely than not. . . .").

[150] *See California v. Brown*, 479 U.S. 538, 546 (1987) (O'Connor, J., concurring) (court must "determine whether the jury instructions, taken as a whole, and considered in combination with the prosecutor's closing argument, adequately informed the jury of its responsibility to consider all of the mitigating evidence introduced by the respondent"); *Brewer v. Quarterman*, 550 U.S. 286, 293 (2007) (considering special issues and prosecutor's closing arguments and finding constitutional violation where it was "surely a reasonable likelihood that the jurors accepted the prosecutor's [closing] argument" that urged limits on what mitigating evidence could be considered); *Abdul-Khabir v. Quarterman*, 550 U.S. 233, 241 (2007) (finding constitutional violation where "the prosecutor discouraged jurors [in *voir dire* and closing argument] from taking into account

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assessment is made through the prism of the "strong policy in favor of accurate determination of the appropriate sentence."[151]

The Mitigation Issue and Instruction, As Applied in Perry's Trial. Under Texas' current capital sentencing procedure, the last question a jury is required to answer has been labeled "the *Penry* issue."[152] The *Penry* issue asks the jury to determine:

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.[153]

As to this issue, the jury is *not* instructed again to consider all the evidence that "militates for or mitigates against the imposition of the death penalty," as it is with the "future dangerousness" issue it must answer;[154] rather, the jury is instructed that it "shall

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[mitigating considerations] when formulating their answers to the special issues").

[151] *Boyde v. California*, 494 U.S. 370, 380 (1990).

[152] *McGinn v. State*, 961 S.W.2d 161, 174 n.1 (Tex. Crim. App.) (en banc) (Baird, J., concurring and dissenting), *cert. denied*, 525 U.S. 967 (1998), *habeas corpus dismissed*, 54 S.W.3d 324, *cert. denied*, 530 U.S. 1211 (2000).

[153] TEX. CODE CRIM. PROC. art. 37.071 § 2(e)(1).

[154] *Id.* at 37.071 § 2(d)(1).

consider mitigating evidence to be evidence that a juror might regard as *reducing the defendant's moral blameworthiness.*"[155]

The Perry prosecutors recognized that, whatever meaning terms like "mitigating evidence," "personal culpability," and "moral blameworthiness" might have in death penalty jurisprudence, they are malleable concepts to the layman, and they seized on the prospect of shaping the jurors' understanding of those terms to limit their consideration of the mitigation evidence. For example, a defendant's background, character, and mental impairments are each recognized as mitigating factors *bearing on* a defendant's moral blameworthiness or personal culpability.[156] The prosecutors, though, recognized that, by listing "the personal moral culpability of the defendant" alongside "the circumstances of the offense" and "the defendant's character and background," the mitigation issue suggests they are *separate* considerations.

Thus, they urged that the "moral blameworthiness" inquiry concerned only the "defendant's personal responsibility in the crime itself."[157] As one prosecutor put it in *voir dire*, "what is to be focused on . . . is his responsibility, his degree of involvement

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[155] *Id.* at art. 37.071 § 2(f)(4) (emphasis added).

[156] *Penry*, 492 U.S. at 324 & 327-28.

[157] 13 R.R. 248:7-8.

in the crime itself."[158] And they obtained jurors' agreement to that reading of the mitigation issue.[159]

The prosecutors further recognized that, because the mitigation instruction defines "mitigating evidence to be evidence that a juror might regard *as reducing the defendants' moral blameworthiness*,"[160] the jury could be convinced incorrectly that it must find some nexus between Perry's mitigation evidence and the crime itself. To that end, they urged the jurors to recognize that personal culpability and moral blameworthiness are synonymous (as they surely are), and that both terms look only to Perry's responsibility for the crime (which they certainly do not). One prosecutor's *voir dire* examination of a juror reflects this tack:

> **Prosecutor:** Have you ever said whether a person is culpable of an offense or not?
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> **Juror:** I have used it. I don't know if I know exactly what it means.
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> **Prosecutor:** Okay. It is usually the first to blameworthiness, responsible. So his personal moral responsibility of the defendant. . . . And it would be referring to his

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[158] *Id.* at 248:3-5.

[159] *See* 7 R.R. 38:11-21; *id.* at 273:19-22; 8 R.R. 99:14-18; 9 R.R. 46:12-47:1; 11 R.R. 42:23-43:25; 12 R.R. 46:18-47:3; and 13 R.R. 247:17-248:25.

[160] TEX. CODE CRIM. PROC. art. 37.071 § 2(f)(4) (emphasis added).

> responsibility for the crime itself. The degree of his involvement is another way of saying it.
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> **Juror:** Okay.[161]

In closing argument, the prosecutors returned to their *voir dire* theme that only evidence linked to the crime itself could be regarded as mitigating. Thus, Perry's troubled genetic background was dismissed:

> But what [Dr. Kessner] talked about was the family tree, the genetic history. You think about that. *These offenses are not alcohol-related offenses. They are not drug-related offenses. So that just doesn't float here, folks. That's just smoke. That's just something they want you to get hung up on.*[162]

So, too, was his Attention Deficit Disorder:

> Think about this: Did you see any signs of ADD when he was up here testifying? Have you seen any signs of ADD when he has been in the courtroom? These offenses that we're talking about weren't impulsive offenses. You think about that. Remember you heard about all the characteristics about ADD, impulsivity. These things – these

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[161] 11 R.R. 81:1-11; *see also* 8 R.R. 99:14-18; 7 R.R. 38:11-21; 12 R.R. 46:18-47:3; 9 R.R. 47:15-19; *id.* at 47:22-48:10.

[162] 27 R.R. 58:12-17 (emphasis added); *see also id.* at 22:3-18.

> horrible acts were planned and premeditated . . .[163]

The prosecution also revisited and underscored its *voir dire* theme that Perry's responsibility for the crime – his deliberate participation in it – essentially ended the matter of Perry's "personal culpability" and "moral blameworthiness." As they put it, the crime was a matter of "[f]ree choice,"[164] it was "Mr. Perry's choice to kill Ms. Stotler and help Adam Stotler – help Jason Burkett kill Adam Stotler and Jeremy Richardson was just that. A choice which today in this courtroom he is alone responsible for."[165]

At a minimum, on this record jurists of reason could debate whether the jury was confused or misled by the prosecutors' *voir dire* and closing argument into giving Perry's mitigation evidence less than its "full effect."[166] Indeed, not debating the district court's decision would mark Texas' *de facto* return to a "less-than-full-effect standard"[167] by licensing prosecutors

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[163] *Id.* at 57:22-58:4.

[164] *Id.* at 59:5.

[165] *Id.* at 22:19-23.

[166] *See, e.g., Brewer v. Quarterman*, 550 U.S. at 293-94 ("There is surely a reasonable likelihood that the jurors accepted the prosecutor's argument at the close of the sentencing hearing that all they needed to decide was whether Brewer had acted deliberately and would likely be dangerous in the future, necessarily disregarding any independent concern that, given Brewer's troubled background, he may not be deserving of a death sentence.").

[167] *Nelson v. Quarterman*, 472 F.3d at 313.

to shape Texas capital trials in a way that unconstitutionally "prevents the consideration of constitutionally relevant evidence."[168]

The Circuit Court Avoided the Issue by Conjuring a Failure to Exhaust. The circuit court avoided the issue by concluding Perry had failed to exhaust.[169] The State, however, expressly waived exhaustion.

In the district court, Perry argued that Texas' mitigation instructions and issue, as applied in his case, fell short of *Penry v. Lynaugh*'s[170] guarantee that a capital jury be able "to give *full* consideration and *full* effect to [a] defendant's mitigating evidence[.]"[171] Perry's federal habeas petition was clear in alleging that this possibility was not based merely on *the face* of the instructions and issue. He repeatedly alleged that, "[i]n practice, the limiting instruction negates the [mitigation] issue's requirement that the jury consider broad categories of mitigating evidence."[172] Indeed, he devoted more than a page of his federal habeas petition to the prosecutor's *voir dire*,

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[168] *Boyde v. California*, 494 U.S. at 380.

[169] App. 15-18.

[170] 492 U.S. 302.

[171] *Nelson v. Quarterman*, 472 F.3d at 298 (emphasis in original).

[172] USCA5 309 & USCA5 312.

explaining how it illustrated the State's manipulation on the instructions and issue.[173]

The State's answer to this argument did not take issue with exhaustion, but rather unqualifiedly admitted that "***Perry exhausted his claims regarding the constitutionality of the Texas mitigation special issue during direct appeal.***"[174] Exhaustion is a prudential principle, rather than a jurisdictional limitation, so a state may waive the defense of nonexhaustion.[175] Section 2254(b)(3) of AEDPA spells out how courts should evaluate the waiver issue: "A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement."[176] The circuit court ignored Section 2254(b)(3) in concluding this admission "is not an express waiver as to [Perry's] as-applied challenge."[177] This reading, that the State's straightforward admission applies only

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[173] USCA5 309-10.

[174] USCA5 2621 (emphasis added).

[175] *See Granberry v. Greer*, 481 U.S. 129, 131 (1987); *Harris v. Reed*, 489 U.S. 255, 263 (1989) (holding that "a procedural default does not bar consideration of a federal claim on . . . habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar.") (internal quotation marks omitted)).

[176] *Id.* at § 2254(b)(3) (a state can "expressly waive[ ] the requirement.").

[177] App. 17.

to the "claims [Perry] presented below,"[178] would effectively limit *waiver* of exhaustion to claims that have, in fact, been exhausted statutorily. In other words, the State could waive its defense of exhaustion only when it has no exhaustion defense to assert.

CONCLUSION

The Petition for a writ certiorari should be granted.

Respectfully submitted,

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Dated: August 6, 2009

[178] *Id.*

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-70017

MICHAEL JAMES PERRY

Petitioner-Appellant

v.

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent-Appellee

Appeal from the United States District Court for the Southern District of Texas, Houston
USDC No. 4:07-CV-01032

(Filed Mar. 11, 2009)

Before JONES, Chief Judge, and CLEMENT and SOUTHWICK, Circuit Judges.

EDITH H. JONES, Chief Judge:*

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Petitioner Michael James Perry was convicted and sentenced to death in Texas state court for murdering Sandra Stotler while burglarizing her house in a subdivision in Montgomery County, Texas. After he exhausted state remedies, Perry sought a writ of habeas corpus under 28 U.S.C. § 2254. The district court denied relief and refused to grant a certificate of appealability ("COA"). Perry now requests a COA on three issues: (1) his counsel was ineffective during the sentencing proceedings; (2) the government withheld potentially exculpatory evidence; and (3) as applied, the jury's mitigation instruction unconstitutionally limited the evidence the jury could consider. Because no reasonable jurist could find the district court's resolution of these issues debatable or conclude that Perry's arguments deserve to proceed further, we deny the request for a COA on all issues.

I. BACKGROUND

Perry's guilt is not at issue in this appeal. The jury convicted him of capital murder for brutally murdering Sandra Stotler in the course of burglarizing her house. According to Perry's confession, he and his friend Jason Burkett decided to steal two cars. They identified two cars, a Camaro and Isuzu Rodeo, that belonged to the parents of another friend, Adam Stotler. Perry and Burkett made a plan to spend the night at the Stotler house and steal a car in the middle of the night. On October 24, 2001, Perry and Burkett drove to the Stotler house with a 12-gauge shotgun in a blue Chevy truck belonging to

Burkett's girlfriend, Kristin Willis. Sandra Stotler, Adam's mother, told Perry and Burkett that Adam would not be home until 9 pm. They returned to their truck and drove several blocks before deciding that it would be easier to steal the car when only one person was home.

When they arrived back at the house, Burkett knocked on the front door and asked to use the phone. Perry then went into the house through the back door in the garage with the shotgun and hid in the laundry room. Perry knocked on the back door. When Sandra Stotler went to the back door, Perry came out of the laundry room and shot her in her side. Sandra Stotler fell, then tried to get up, and Perry shot her again. At this point, Perry and Burkett wrapped her in bedsheets and blankets and loaded her into the back of the truck. As they could not find the keys to the Camaro, both Perry and Burkett left in Willis's truck.

Burkett drove the car to nearby Crater Lake. At first, Burkett and Perry opened the tailgate and tried backing up to the lake, hoping that Sandra Stotler's body would slide out. When that did not work, they grabbed her body and rolled her into the water. They covered her body with the sheets, sticks, and brush. Burkett and Perry drove to pick up Willis from work and returned to the Stotler house. When Adam Stotler arrived back at his house with his friend Jeremy Richardson, Burkett and Perry convinced them that a friend had been shot in the woods and needed their help. Adam and Jeremy followed Willis's truck in Adam's Isuzu. When they arrived in the

woods, Perry and Burkett led Adam and Jeremy into the woods. According to Perry, Burkett shot Jeremy and then Adam. Perry removed the car keys and wallet from Adam's pocket. Burkett and Perry returned to the truck. Willis asked what had happened, became upset, and left in her truck. Burkett and Perry stole the Camaro and Isuzu. Perry ended his confession by stating that they returned home, cleaned up, and went to a bar.

Two days later, Perry attempted to evade police who had tried to stop him for traffic violations. The high speed chase ended when Perry wrecked the Camaro and fled on foot. He was eventually apprehended with Adam Stotler's wallet. He was booked and released on bond as Adam Stotler. The next day, Sandra Stotler's body was found in Crater Lake. Several days later, while in the stolen Isuzu, Perry and Burkett ran into a deputy sheriff's vehicle while trying to escape arrest. The vehicle crashed into a nearby store. Burkett and Perry were arrested hiding in a neighboring apartment complex; the shotgun used to kill Sandra Stotler was also found there.

Forensic evidence found near Crater Lake, in the woods, and at the Stotler residence matched Perry's confession. Perry was tried for Sandra Stotler's murder. During his trial, Perry took the stand in his defense and claimed that his confession had been untrue. Perry, however, had made several subsequent statements that implicated him in the murder.

At the sentencing phase, the defense presented extensive evidence about Perry's family history and upbringing. An adopted child, Perry had been diagnosed with Attention Deficit Disorder ("ADD") at 8 years old. He was later diagnosed with oppositional defiant disorder. A year after that, he was diagnosed with conduct disorder. Perry twice tested negative for bipolar disorder after being admitted to a mental hospital. He never qualified for special education classes in elementary school, had an IQ of 97, and was by all accounts an average student.

Perry often ran away from home. He stopped going to school in junior high. He stole his mother's jewelry and the family car. He broke into a neighbor's home and destroyed the moldings. Perry's parents filed charges and had him committed to a long-term facility for mental health care. He was sent to Boys Town in Nebraska, but after threatening his house parents, he was moved to a locked facility within the program. Perry's problems did not qualify him for any mental health care provided by the facility. When he was expelled from Boys Town, his parents moved him to a secured high school campus in Mexico called Casa by the Sea. After high school, Perry was essentially homeless and jobless. He had a brief stint in the Job Corps, laying tile, and at Wal-Mart. Perry also stole and sold prescription pills to support his indulgence in alcohol and pills.

The defense presented testimony from Perry's biological mother who testified that she used drugs and alcohol until a month or two before Perry was

born. Despite this, Perry was full weight and healthy when born. Although no biological relatives had committed murder, Perry's mother testified to a family history of depression, alcoholism, drug use, and thievery. Dr. Gilda Kessner, a clinical psychologist with a forensics background, interviewed Perry and testified that Perry's youthfulness was his greatest risk factor for recidivism. After serving time in prison, Dr. Kessner testified, the likelihood of Perry's becoming violent would drop to zero.

The jury found Perry guilty of capital murder. During the sentencing phase, the jury found that Perry posed a continuing threat to society and that there were not sufficient mitigating circumstances to warrant a life sentence. The trial court sentenced Perry to death. The Texas Court of Criminal Appeals affirmed, and the United States Supreme Court refused Perry's petition for a writ of certiorari. Perry then filed a writ of habeas corpus. The Texas Court of Criminal Appeals denied all nineteen grounds for relief. Perry filed a federal petition for a writ of habeas corpus. The district court granted the director's motion for summary judgment and *sua sponte* denied Perry a certificate of appealability. Perry subsequently filed this appeal.

II. DISCUSSION

To obtain a COA under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which governs this case, Perry must make a

"substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S. Ct. 1029, 1039 (2003). Thus, he "must demonstrate that reasonable jurists could find the district court's resolution of his constitutional claims debatable or that reasonable jurists could conclude that the issues presented are adequate to deserve encouragement to proceed further." *Martinez v. Dretke*, 404 F.3d 878, 884 (5th Cir. 2005) (citing *Miller-El*, 537 U.S. at 336, 123 S. Ct. at 1039). "This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims." *Miller-El*, 537 U.S. at 336, 123 S. Ct. at 1039. Rather, it only "requires an overview of the claims in the habeas petition and a general assessment of their merits." *Id.* Nevertheless, "[b]ecause the present case involves the death penalty, any doubts as to whether a COA should issue must be resolved in [the defendant's] favor." *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir. 2000).

In addition, a state habeas court's findings of facts and its credibility determinations are presumed correct but may be rebutted by clear and convincing evidence. *See Summers v. Dretke*, 431 F.3d 861, 871-72 (5th Cir. 2005) (citing 28 U.S.C. § 2254(e)(1)).

Against these background criteria, we address each of Perry's issues.

A. Ineffective Assistance of Counsel

In his application for a COA, Perry asserts that his trial counsel failed adequately to investigate, develop and present mitigating evidence for use at sentencing. Under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), Perry must show that his trial counsel's performance was deficient and that the deficiency resulted in prejudice. We measure counsel's performance against an objective standard of "reasonableness under prevailing professional norms." *Id.* at 688, 2065. Analysis under this standard begins with a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and we must make "every effort . . . to eliminate the distorting effects of hindsight." *Id.* at 689, 2065.

When assessing effectiveness at the sentencing stage, counsel's "investigations into mitigating evidence should comprise efforts to discover all reasonably available mitigating evidence." *Wiggins v. Smith*, 539 U.S. 510, 524, 123 S. Ct. 2527, 2537 (2003). In assessing the prejudice prong, this court will ask "whether the changes to the mitigation case would have a reasonable probability of causing a juror to change his or her mind about imposing the death penalty." *Blanton v. Quarterman*, 543 F.3d 230, 236 (5th Cir. 2008). In doing so, we "evaluate the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding – in reweighing it against the

evidence in aggravation." *Williams v. Taylor,* 529 U.S. 362, 397-98, 120 S. Ct. 1495, 1515 (2000).

First, Perry argues that counsel was late in locating and unsealing Perry's adoption records. Trial counsel subpoenaed Perry's adoption records at the beginning of jury selection, found several biological and adoptive relatives to testify, and retained Dr. Kessner to put together a mitigation package for sentencing. While Perry does not dispute this, he claims earlier and further investigation would have turned up three generations of alcoholism, substance abuse, and depression and provided a more complete picture of Perry's inherited problems.

Second, Perry argues that he is bipolar and a more complete psychological evaluation would have revealed his mental illness. Although Perry's counsel attributed Perry's crime to impulsivity associated with mental illness, the jury did not hear any specific evidence that Perry might be bipolar. Dr. Kessner is a clinical psychologist who interviewed Perry for seven to eight hours and also interviewed his biological relatives. The doctor testified at sentencing that Perry had ADHD and had suffered sexual abuse as a child. Although Dr. Kessner did not suspect Perry of being bipolar and there was nothing in Perry's record to indicate that he might suffer from bipolar disorder,[1] Perry argues that effective trial counsel

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[1] The first mention of possible bipolar disorder was not made until Perry was transferred to death row.

would have suspected organic brain damage or some mental impairment beyond what had already been discovered.

Finally, Perry argues that his counsel did not investigate and present sufficient evidence of his drug and alcohol abuse. Although counsel presented evidence of Perry's drug and alcohol problems, Perry argues that counsel did not present it as serious enough or as something Perry had no control over. Counsel did present evidence that Perry had starting drinking and smoking marijuana at a very young age, had progressed to more serious drugs, was involved in a lot of drugs and drinking, and had been selling prescription drugs at one point.

Perry argues that trial counsel's conduct is analogous to the ineffective assistance in *Rompilla v. Beard,* 545 U.S. 374, 125 S. Ct. 2456 (2005). In that case, post-trial investigation uncovered a picture of Rompilla's "childhood and mental health [that was] very different[ ] from anything defense counsel had seen or heard." *Id.* at 390, 2468. Despite the fact that the prosecution had provided defense counsel with the file that included such evidence, Rompilla's counsel did not present this evidence during sentencing and had failed to examine a public file of the defendant's previous convictions. Petitioner has also directed us to *Walbey v. Quarterman,* No. 08-70007, slip op. (5th Cir. Jan. 19, 2009), an unpublished and therefore non-precedential opinion of this court. As with Rompilla's counsel, Walbey's trial counsel did not discuss mitigation with the psychologist, interview

Walbey's mother, or investigate Walbey's relationship to the victim. The psychologist in that case presented no testimony on the mitigation issue.

In this case, however, Perry is unable to point to the sort of unreasonable performance that existed in *Rompilla* or *Walbey*. Perry's counsel did extensive investigation into Perry's biological family, provided the jury with testimony regarding Perry's troubled background, and offered Dr. Kessner's evaluation and mitigation testimony. Trial counsel was not required to shop for an expert who would diagnose Perry with a disorder for which he had already tested negative or present even more evidence of Perry's genetic past. "While in hindsight, it is easy to say that trial counsel could have done more, we find the state habeas court reasonable in its conclusion that trial counsel performed reasonably based on the context and circumstances at the time of the representation." *Blanton v. Quarterman*, 543 F.3d 230, 239 (5th Cir. 2008).

Because Perry fails to raise an issue concerning counsel's mitigation strategy that is debatable among reasonable jurists, we need not consider the *Strickland* prejudice prong and deny COA on this issue.

B. *Brady* Violation

Perry argues that the prosecution violated his right to due process when it concealed potentially exculpatory evidence. Specifically, he believes that the State willfully or inadvertently withheld evidence

that would have impeached key witnesses, Victor Neal and Kristin Willis, and that this prejudiced him.

Under *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194 (1963), the suppression by the prosecution of "evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87, 1196-97. In order to prevail on a *Brady* claim, Perry must show that "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene,* 527 U.S. 263, 281-282, 119 S. Ct. 1936, 1948 (1999). This court has held that "evidence is not 'suppressed' if the defendant either knew, or should have known of the essential facts permitting him to take advantage of any exculpatory evidence." *Rector v. Johnson,* 120 F.3d 551, 560 (5th Cir. 1997).

Victor Neal was Perry's roommate at the time of the murder. He testified both at the guilt and sentencing stage of the proceedings. Neal provided testimony that Sandra Stotler's murder was premeditated, that Perry and Burkett drove around town with a loaded shotgun looking for a place to dump the body, and that Perry was a serial criminal. At the sentencing stage, Neal testified that he was present when Perry and Burkett broke into a house and stole several electronics but that he waited in the car.

Perry now argues that the prosecution agreed not to prosecute Neal for his role as a lookout in the burglary and that they failed to turn over this information to the defense.

The State admits that Neal was nervous about his role in the burglary, but it asserts that prosecutors only assured Neal that they were not interested in him and that in exchange for his cooperation they did not discuss immunity or any other promises not to prosecute Neal in exchange for his testimony. One of the prosecutors explained to Neal that, based on what Neal had described, he could not be prosecuted because he was not actually a participant in the crime.

The State is required to disclose any inducements made to a witness – not just formal immunity agreements or promises. "Where, as here, the witness's credibility 'was . . . an important issue in the case . . . evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it.'" *Tassin v. Cain*, 517 F.3d 770, 778 (5th Cir. 2008) (quoting *Giglio v. United States*, 405 U.S. 150, 154-55, 92 S. Ct. 763 (1972) (omissions in original)).

The state habeas court issued extensive and detailed factual findings, including that the "State did not suppress evidence of an 'immunity agreement' with Victor Neal," "the evidence was insufficient to prove that Mr. Neal was more than merely present during the burglary," and, even without Neal's

testimony, "the evidence of [Perry's] guilt is overwhelming." Perry does not present clear and convincing evidence to contradict these findings. It is untenable to argue that prosecutors have achieved testimony for their side from an innocent witness by offering to do that which they are required to do, *i.e.* not prosecute. We, therefore, agree with the district court that no reasonable jurist could conclude that the prosecutors violated their obligations under *Brady* in the way that they presented Neal's testimony.

Perry also contends that the prosecution suppressed a blood spatter on Kristin Willis's shirt, which would have impeached her testimony that she was not present during the murders. According to an affidavit from the State, the prosecution had an open file policy. Willis's shirt, her statement admitting that the shirt was hers, and blood tests revealing blood matter and the possibility of a high velocity blood spatter were all included in the case file. Trial counsel admitted that he recalled seeing photos of the shirt, and another trial counsel remembered seeing DNA reports on it.

Perry acknowledges that his trial counsel were aware of the shirt and a DNA report that did not link the blood on the shirt to Perry or Sandra Stotler, but he argues that the blood spatter itself was not disclosed. Because the State maintained an open file policy and trial counsel had access to the necessary information, the prosecution had no duty to give further guidance as to what evidence may have been

exculpatory. *See United States v. Mulderig*, 120 F.3d 534, 541 (5th Cir. 1997). In addition, there was unrefuted evidence that Kristin Willis was at work during the time that Sandra Stotler was killed. This evidence included phone and work records and the testimony of a coworker.

In the alternative, Perry asserts in passing that if his trial counsel did have access to the blood spatter trial counsel was ineffective for failing to use the shirt to impeach Willis. Perry, however, did not brief this issue to the district court and presents no reason why her impeachment could have overcome the overwhelming evidence tying him to Sandra Stotler's murder.

Our review of the record persuades us that reasonable jurists could not debate the district court's conclusion that no relief is warranted by the *Brady* claims.

C. Unconstitutional Mitigation Instruction

Perry argues that, as applied, the Texas mitigation instruction unconstitutionally limited the mitigating evidence that Perry's jury considered. Because Perry did not raise this as-applied challenge before the state courts or the district court, his claim has not been exhausted and is procedurally defaulted.

"A federal habeas petition should be dismissed if state remedies have not been exhausted as to all of the federal court claims. . . . The exhaustion

requirement is satisfied when the substance of the federal habeas claim has been fairly presented to the highest state court." *Smith v. Dretke*, 422 F.3d 269, 275 (5th Cir. 2005) (citing *Picard v. Connor*, 404 U.S. 270, 275-78, 92 S.Ct. 509 (1971)). "The exhaustion requirement is not satisfied if the prisoner presents new legal theories or factual claims in his federal habeas petition." *Nobles v. Johnson*, 127 F.3d 409, 420 (5th Cir. 1997) (citing *Anderson v. Harless*, 459 U.S. 4, 6-7, 103 S. Ct. 276 (1982)).

In his brief to the district court, Perry brought a facial challenge to Texas's mitigation instruction. Examples from his trial were given to demonstrate the facial invalidity of the instruction. Perry now argues that this also constituted an as-applied challenge. Nothing in his brief, however, gave any indication that Perry was challenging Texas's mitigation instruction as it was applied in his case. Rather, Perry argued that "viewed in practice, [the Texas scheme] unconstitutionally denies capital defendants the right to have all their relevant mitigating evidence considered by the jury."

The district court made no ruling on the effect of the mitigation instruction in this trial because Perry had not argued it. We reject Perry's suggestion that the district court had an independent obligation to look beyond the issue and instruction for "reason to believe that the jury was confused or misled in answering the mitigation special issue." *Scheanette v. Quarterman*, 482 F.3d 815, 826 (5th Cir. 2007). In *Scheanette*, the district court considered the

as-applied challenge to the instruction because it had been raised by Scheanette, not because of an independent obligation to do so. *Id.* ("Scheanette's claim that the instruction in effect 'nullified' the mitigation special issue is unsupported."). Requiring district courts to search through the record to determine whether as-applied *Penry* challenges are appropriate would be a gross distortion of AEDPA, which places the burden on the petitioner to prove that the state courts have unreasonably applied governing constitutional law. *See Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934 (1989) (holding that jury instructions must provide the jury with a vehicle for expressing its reasoned moral response to mitigating evidence in rendering its sentencing decision).

At the state level, Perry briefly made a facial challenge to the mitigation instruction in his direct appeal to the Texas Court of Criminal Appeals. In his reply brief to this court, Perry does not contest that he did not argue an as-applied challenge to the state court. Instead, Perry argues that the State waived this argument. 28 U.S.C. §2254 states that a state can only waive the exhaustion requirement through express waiver. In its answer to Perry's federal habeas petition, the State acknowledged that "Perry exhausted his claims regarding the constitutionality of the Texas mitigation special issue during direct appeal." This is not an express waiver as to the as-applied challenge. While the State conceded that Perry had exhausted the claims he had presented

below, the State did not and could not have waived this argument as to the new claims he now argues.

Because Perry did not exhaust this argument at the state level or brief this issue to the district court, we will not consider it.

III. CONCLUSION

For the reasons discussed above, we deny Perry's request for a COA on all claims and as such lack jurisdiction to review the district court's denial of habeas relief on these claims. *See Miller-El*, 537 U.S. at 335-36, 123 S. Ct. at 1039.

COA DENIED.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

Michael James Perry, Petitioner, VS. Nathaniel Quarterman, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	§ § § § § § § § § § §	Civil Action No. 07-1032

MEMORANDUM AND ORDER

(Filed Feb. 22, 2008)

Michael James Perry ("Perry"), a Texas inmate, filed a federal petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In 2003, a jury convicted Perry of capital murder for killing Sondra [sic] Stotler during a robbery. After a separate punishment phase, the jury answered Texas' special issue questions in a manner requiring the imposition of a death sentence. This action comes before the Court on Respondent Nathaniel Quarterman's answer and motion for summary judgment. (Docket Entry No. 13). After reviewing the pleadings, the record, and the applicable law, the Court **GRANTS** Respondent's summary judgment motion, **DENIES** Perry's petition, and

DISMISSES this case. The Court will not certify any issue for appellate review.

BACKGROUND

On Saturday, October 27, 2001, a fisherman found a decomposing body floating in Crater Lake which is located in a secluded, heavily wooded section of Montgomery County, Texas. The body was wrapped in a comforter, blanket, and sheet. The body had been shot twice with a shotgun. The next day a medical examiner performed an autopsy on the corpse. The condition of the yet-unidentified body suggested a death "probably at least" 24 to 48 hours before the autopsy. Tr. Vol. 15 at 99-101, 119.[1]

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[1] Perry creates a self-exculpating timeline of the events surrounding the victim's death that he premises on the argument that the assistant medical examiner's "autopsy report determined the time of Stotler's death to be during the twenty-four hour period commencing *at 1:00 p.m. on October 26, 2001.*" (Docket Entry No. 4 at 6). The record does not contain the original autopsy record for Ms. Stotler. The trial testimony was not that specific. The medical examiner never gave an exact time of death, but loosely opined that the victim was "probably at least" dead 24 to 48 hours before the autopsy. Tr. Vol. 15 at 100. The most concrete statement the assistant medical examiner gave was that the killing occurred "probably . . . 24 to 48 hours" before the examination. Tr. Vol. 15 at 101. Police reports note that Adam Stotler's body, who was killed the same day as his mother, showed little decomposition though it had been exposed to the elements, "most likely due to the cold temperatures" of the previous week. State Habeas Record at 1263. Trial testimony corroborated Perry's confession wherein he claimed to have killed the victim on October 24, 2001. Most

(Continued on following page)

On Sunday, October 28, 2001, a co-worker called the police because Sandra Stotler did not report to work. Police officers visited Ms. Stotler's home to perform a welfare check. There, they found blood splatter on the ceiling, walls, and floor near the entryway to the garage. The police also found bloody footprints and "some blood drag marks" in the garage. Tr. Vol. 15 at 185. While the house was otherwise orderly, the master bedroom was in disarray. Of particular interest, the bedding appeared to have been removed. The bedding matched that found in Crater Lake. Ms. Stotler's two vehicles, a white Izusu Rodeo and a red Camaro, were not at her house.

Perry was eventually arrested for, and convicted of, the victim's murder. Perry confessed to killing Ms. Stotler, as well as to involvement in two related murders. Throughout his state and federal proceedings, Perry has claimed that he is actually innocent.[2] Perry's argument presumes that the police manufactured evidence against him, that witnesses testified

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problematic to Perry's self-serving construction of events, however, is his possession of Ms. Stotler's cars on October 21, 2001. Perry does not adequately explain why he was driving her cars "if Ms. Stotler had not already been murdered." State Habeas Findings of Fact and Conclusions of Law ("FFCL"), p. 4 at ¶18.

[2] Perry's federal petition does not raise an actual innocence claim, but his construction of the facts and the flow of his arguments assume that his confession was the only thing that linked him to the victim's murder.

falsely, and that his trial attorneys[3] ineptly defended him against the allegedly spurious charges. Perry assumes that only his confession connected him to her murder. Perry's argument presumes the existence of a vast conspiracy in which many State actors misconstrued or manufactured evidence against him. A thorough review of the record however, reveals that the prosecution had a strong case against Perry. Careful analysis confirms that "the evidence of [Perry's] guilt is overwhelming." State Habeas Findings of Fact and Conclusions of Law ("FFCL"), p. 12 at ¶88.

Events Leading to Perry's Arrest

The State of Texas charged Perry and his friend Jason Burkett with capital murder for killing Sondra [sic] Stotler during the course of a robbery. The State developed a theory that Perry and Burkett killed the victim to steal her two vehicles, a red Camaro and white Izusu Trooper. For several days after the victim's murder, the police had no idea she died, much less that Perry killed her. In the days immediately following her death, however, events transpired that made Perry a suspect.

On Thursday, October 25, 2001, the Montgomery County Sheriff's Office received information that

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[3] Donald R. Cantrell and Stephen C. Taylor represented Perry at trial. The Court will refer to these lawyers conjunctively as "trial counsel" as often as possible unless it is necessary to specify one attorney.

Burkett, who had an outstanding warrant, might be driving a red convertible or an Isuzu Trooper. Tr. Vol. 15 at 215-16. On Friday, October 26, 2001, Montgomery County Sheriff's Detective Monte Morast drove to the travel trailer where Burkett and Perry lived. As he neared the location, Detective Morast saw a red convertible Camaro traveling in the opposite direction. The driver of the Camaro committed several traffic infractions. Tr. Vol. 15 at 218. When Detective Morast tried to pull the Camaro over, the driver initiated a high speed chase. The Camaro crashed. The driver of the Camaro then fled on foot. The police arrested a passenger who told them that the driver was named "Mike Perry." Tr. Vol. 15 at 227-28.

After a chase, the police arrested the driver of the Camaro. The Camaro was registered to Sandra Stotler. Tr. Vol. 15 at 229. The police were unable to contact Ms. Stotler. Tr. Vol. 15 at 229. The driver gave the police the licence of 16-year old James Adam Stotler. Tr. Vol. 15 at 228-30. Detective Morast issued the driver a citation for traffic infractions and booked him into jail for misdemeanor evading arrest under the name Adam Stotler. Tr. Vol. 15 at 230-31.

A friend called Burkett's fiancé Kristin Willis[4] and asked her to pick Perry up after he bonded out of jail. When Ms. Willis arrived at the bonding company,

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[4] The record spells Ms. Willis' name both "Kristin" and "Kristen."

Perry said to call him "Adam" because "he got out of jail on a friend's name." Tr. Vol. 16 at 249. The police later determined that they had actually arrested Perry.

Perry's Arrest

The police soon identified Perry and Burkett as suspects in Ms. Stotler's murder. Tr. Vol. 23 at 14-15. At 5:00 a.m. on Tuesday, October 30, 2001, Montgomery County Sheriff's Department Officer Howard Lee Smith, III saw Ms. Stotler's Isuzu behind a gas station in Spring, Texas. Officer Smith saw three people inside the vehicle. Officer Smith contacted dispatch, who said that the occupants of the Isuzu were likely armed and dangerous. Officer Smith turned on his lights, parked in front of the Isuzu, grabbed his shotgun, and got out of his car. Officer Smith could hear the sirens from other approaching police cars.

Officer Smith repeatedly identified himself as a police officer and told the occupants to show their hands. One passenger, later identified as Perry, started to get out. Officer Smith ordered all the men stay in the car with their hands raised. After a few moments, the driver, later identified as Burkett, started the Isuzu and drove it straight into Officer Smith. Officer Smith rolled off the roof, steadied himself, and shot out the back passenger tire. The individuals in the Isuzu shot at him several times. Officer Smith saw the Isuzu turn the corner of the

building, heading toward the freeway. Tr. Vol. 15 at 244-61.

Another police officer turned into the gas station as the Izusu was leaving. The Isuzu swerved, struck a concrete divider, and veered into a nearby building. Perry cut his arm on some glass after the Isuzu crashed into the building. Tr. Vol. 17 at 156. Burkett exited the building and pointed a shotgun at police officers. The police repeatedly shot at him. Burkett and Perry fled. Because of injuries he received in the accident, Burkett had to help Perry flee. One passenger gave himself up and told the police that the other occupants headed north.[5]

The police set up a perimeter of the area. Earlier in the evening, the police had visited a nearby apartment complex looking for Perry and Burkett.[6] The police returned to that apartment. When the police arrived at that location, Megan Lazrine was standing on the balcony yelling "Come on. Come on. Come on." Tr. Vol. 15 at 300. Burkett was standing next to her.

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[5] The passenger, Aaron Davidson, met Perry and Burkett the day before Perry's arrest. Perry and Burkett were driving the Isuzu. Perry had been drinking throughout the day. Later that night Davidson met Burkett and Perry again, and they drank alcohol with others in a neighborhood park. Davidson said that Perry was "intoxicated" but not "drunk." Tr. Vol. 15 at 276-77. Davidson, Burkett, and Perry then drove to sleep behind the gas station. When awoken by Officer Smith, Perry said that he was "not going down." Tr. Vol. 15 at 280-81.

[6] The police had visited that apartment at around 2.00 a.m. looking for Perry and Burkett. Tr. Vol. 16 at 31.

When the police went into the apartment, Burkett and Perry were in the living room. Burkett had been shot multiple times. Perry was bleeding from a cut on his arm. Tr. Vol. 15 at 301-02. Officer Sidney Blair arrested Perry. Perry was cooperative, walked out of the apartment without difficulty, and was moved into an ambulance. Perry seemed upset, but not drunk. Tr. Vol. 15 at 308, 322.

Perry's Confession

Detective Carey Mace, the lead detective in Ms. Stotler's murder, arrived after Perry had been placed in an ambulance. When Detective Mace introduced himself, Perry "immediately . . . started talking" and said "I know it's the needle and I want to save everybody the trouble and just confess." Tr. Vol. 16 at 95.[7] Detective Mace interrupted Perry and delivered the *Miranda* warnings. On the ambulance ride to the hospital, Detective Mace questioned Perry. Perry

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[7] Another officer heard Perry say: "he knew what was going on, that he was – it was going to be the needle or he was going to get the needle and he was just going to make it easy on everybody[.]" Tr. Vol. 15 at 309. A paramedic confirmed that, when Detective Mace entered the ambulance, Perry stated that "I know I have a lawyer, but I am going to save us both a lot of time." Tr. Vol. 16 at 60. Detective Mace then interrupted him and read the *Miranda* rights. Tr. Vol. 16 at 60. Perry never requested to speak with an attorney. Tr. Vol. 16 at 62. Perry seemed "very calm" while he confessed. Tr. Vol. 16 at 61. The paramedic testified, however, that Perry had a hematoma on his head. Tr. Vol. 16 at 70-72, 79-83.

confessed to killing Ms. Stotler.[8] Perry was coherent and did not seem intoxicated while confessing. At the

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[8] Officer Sidney Blair, who was the scene during Perry's arrest, never saw Detective Mace coerce, threaten, or harm Perry in order to secure the confession. Tr. Vol. 15 at 311-12. One of the paramedics in the ambulance verified that Perry was cooperative. She testified that the police did not threaten, coerce, or act hostile to Perry. She also stated that Perry did not seem intoxicated. Tr. Vol. 15 at 55-57, 62. Another paramedic affirmed that he did not seem intoxicated. Tr. Vol. 17 at 153. At trial, Perry gave the following narrative account of his arrest:

> At the time I had had – I had previous encounters with the law like a misdemeanor drug possession or something that I missed a court date on and I knew I had a warrant for it. The night of October 24th, 2001, I had been drinking heavily on quite – quite a few amount of pills and we ended up sleeping in a white Rodeo as a result of not being able to drive, neither – any of the occupants in the car. We didn't feel safe driving because of our influence. We pulled over and slept. Shortly after I continued to drink in the car. I must have passed out. I might have been asleep ten minutes. I couldn't tell you the exact amount of time, but a patrolman woke us up telling us to freeze, put our hands up. At the time when he pulled his – he had a gun out. He told us to freeze. I tried to attempt [*sic*] to get on the ground, exit the car and get on the ground. I was kind of scared and nervous at this point. [Jason] Burkett was talking about balls to the walls or some statement along that effect. He had a shotgun, so I – and from what Kristin – from what people had told me, what I had heard him say, I knew that he was capable of doing almost anything now. We ended up wrecking through a glass building. I witnessed Jason get shot. I was cut pretty badly. He kind of assisted me to some apartments. And at the time of arrest – I will jump to that – the door was not kicked in, but forced open and many officers – I

(Continued on following page)

hospital, Detective Mace made an audiotaped recording of Perry's statement. Perry signed a written confession to the murder.

The prosecution presented the following portion of Perry's written confession at the guilt/innocence phase of trial:

> Last week, the week of October 22-26, my friend, Jason Burkett, and I decided we needed to get a vehicle, or two vehicles. We

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couldn't tell you how many. Three or four with dogs came in the apartment. I was stood up against the wall by [Blair]. I had a gun shoved in my face. Told to the best of my recollection how would you – he [one of the victims of the triple homicide] was my friend or she was my friend or how could you do something like that. You are damn well going to tell me – tell me what happened and I was put on the ground and the knee in the back of my head and cuffed. Then put on the pavement for a pretty long amount of time. They asked to put me in the ambulance. I wasn't put in there because we were waiting for [Mace] and finally Ms. Connie [a paramedic] or whoever the supervisor was at the time – I now know her name to be Connie – had asked to put me in there. At the time there was quite a bit of excitement. I was under the influence. My arms hurt pretty bad and I was real scared. I was just totally – I was being a suspect. I wasn't charged yet, but I was a suspect in a triple homicide or capital murder. At the time of bringing me to the hospital, my condition in my mind state was that I am going to tell [Mace] anything he wants to hear to get him away from me, to get me out of this situation and that's what I did. I was hungry, tired and just fed up[.]

Tr. Vol. 18 at 83-85.

both know a younger white male, known to us as Adam Stotler whose parents have a lot of money. They also have a newer Camaro and Isuzu Rodeo.

On Wednesday 10-24-01 Jason and I made a plan that we were going to ask to spend the night with Adam at his house, and we were going to take the Camaro in the middle of the night while Adam and his mom was [*sic*] sleeping. We went to Adam's house at about 7 pm on Wednesday 10-24-01. Jason was driving his girlfriend, Kristen [Willis'], blue Chevy truck, and I was riding in the passenger seat. We had a 12 gauge shotgun with us. Jason and I got to Adams [*sic*] house, and his mom told us that Adam was not home, that he was at the skate park and would be home around 9 pm.

Jason and I left in the truck, but before we got out of the subdivision, Jason said that it would be easier to get the car with only one person home. Jason and I then made a plan that Jason would knock on the front door, and I would sneak in the back door, through the garage with the shotgun. We went to Adam's house on foot and left Kristen's truck down the road. I walked around to the side of the house through the garage, and Jason knocked on the front door and asked to use the phone. When I heard Jason talking on the phone, I went into the house through the back door in the garage. Once in the house, I hid in the laundry room between the kitchen and garage. I then knocked on the back door,

and when Adam's mom came to the back door, I shot her one time in the side near her back with the shotgun. She fell to the floor, and I dropped the shotgun.

She then moved or tried to get up or something, and I grabbed the shotgun and shot her one more time. She fell to the floor in front of the laundry room and garage, back door. Jason freaked out and ran to the front door and opened the door. We calmed down a little and grabbed the blankets and sheet off of the bed in the bedroom near the kitchen and put the blankets and sheet over her because we did not want to look at her. Jason ran and got Kristen's truck and brought it back to Adam's house. Jason backed the truck into the garage, and we dragged Adam's mom's body and the blankets out into the garage, where we loaded her into the back of the truck with the blankets and sheet. I could not find the keys to the Camaro, and I remembered that the inspection sticker was expired, and Adam's mom never drove it.

Jason then got into the drivers [*sic*] side of the truck and I got in the passenger seat, and Jason drove to an area he called Crater Lake. I did not know where Crater Lake was, but I remember driving down a dirt road, then going across a big bump and seeing some type of pipeline or something. We then drove down a cleared road and saw an old stripped out truck blocking the road. The road to what Jason called Crater Lake was

> off to the left of the stripped truck. Jason turned the truck around and first tried to open the tailgate, speed backwards toward the pond, and try to slam on the brakes to get the body to slide out. He did that I think twice, but it would not work so we grabbed her body, and we rolled her down into the water. Jason and I then threw sheets into the water on top of her and covered her up with some sticks and brush we found near by. It was about 8:20-8:30 pm by that time, and we drove to pick up Kristen, where she works at Big Dog Sports at the Outlet Mall in Conroe.
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> I jumped the fence and ran to Adam's house. I got in the Camaro, which was parked in the garage and drove it out of the garage. I pressed the button to close the garage door, but it would not close so I drove off. I drove out of the gate, met Jason, and we left to go to our trailer. Jason drove the white Isuzu with the shotgun in it, and I drove the red Camaro. We went home, smoked several cigarettes, and then got cleaned up and went to Nite Life [night club].

Tr. Vol. 21, State's Exhibit 129.[9]

Perry has repeatedly claimed that he did not knowingly and voluntarily confess to the murder,

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[9] The prosecution played the audiotape in the guilt/innocence phase. Detective Mace also read the written statement to the jury. Tr. Vol. 16 at 102-110, 147, 150-153.

though he has recently changed the basis for disclaiming his confession. At trial, Perry asserted that his substance abuse before his arrest caused him to make a false confession. He also claimed that the police continued to interrogate him even though he invoked his right to counsel.[10] Now, Perry alleges that the police beat and strangled him until he confessed. In claiming that his arguments relating to his confession exonerates him, however, Perry ignores or distinguishes significant trial testimony and evidence that confirmed the details he gave in his confession.

Incriminating Evidence Introduced at Trial

In his federal petition, Perry alleges that "there is no eyewitness testimony or physical evidence that ties him to Ms. Stotler's murder." (Docket Entry No. 19 at 34). Physical evidence, taken from the Stotler home and Crater Lake corroborated Perry's detailed account of the murder. Circumstantial evidence also inculpated Perry. The police recovered a copy of a newspaper story about Ms. Stotler's death from the Isuzu. Tr. Vol. 16 at 155. Blood samples taken from the back of Kristin Willis' truck matched Ms. Stotler's DNA. Tr. Vol. 16 at 156, 298. The shotgun used to kill Ms. Stotler was linked to Perry. Tr. Vol. 17 at 46-47. The title to Ms. Stotler's Camaro was found inside the

[10] When Detective Mace wanted to speak with Perry again on October 31, 2001, he asserted his right to counsel. Tr. Vol. 16 at 181. Detective Mace stopped questioning Perry when he invoked his right to counsel. Tr. Vo. [sic] 16 at 181-82.

Isuzu, but Perry had written on it that the vehicle had been transferred to him for $4,000. Tr. Vol. 16 at 293; State's Exhibit 90c. Adam Stotler's wallet was in the Isuzu. Tr. Vol. 16 at 301. The police found shotgun shells in the Isuzu. Tr. Vol. 16 at 302. Perry and Burkett's prints were found in Ms. Stotler's Camaro and Isuzu. Tr. Vol. 16 at 306-08.

Kristin Willis testified for the State and corroborated elements of Perry's confession. She confirmed that on Wednesday, October 24, 2001, Ms. Willis lent Perry and Burkett her truck while she was at work. They picked her up from work "at about 8:15, 8:20" p.m. Tr. Vol. 16 at 242. The men asked Ms. Willis to drive. She dropped them off at the Stotler house and left. Tr. Vol. 16 at 244. In the guilt/innocence phase, Ms. Willis did not discuss the events that occurred in the next few hours. She testified, however, that she saw the two men driving the victim's red Camaro the next day. Tr. Vol. 16 at 245. The men later told Ms. Willis that they were going to flee to California. Tr. Vol. 16 at 251.

Most important, witnesses testified that Perry repeatedly incriminated himself. Perry told people that he "made the front page" of the newspaper, referring to a story about the discovery of Ms. Stotler's body in Crater Lake. Tr. Vol. 16 at 25. Two friends, Ms. Willis and Victor Neal, testified that Perry previously talked about stealing a car. Perry told Mr. Neal that, when stealing a car, he would "[g]et rid of [the driver] or something so they wouldn't get identified." Tr. Vol. 18 at 260. Perry and Burkett had taken Mr.

Neal to Crater Lake before and told him that "you can hide stuff [there and] you won't get caught because it don't come back. It just sinks to the ground." Tr. Vol. 18 at 264. Witnesses saw Perry and Burkett driving Ms. Stotler's vehicles on Wednesday, October 24 and thereafter. The two men told people that they bought the cars with the winnings from a lottery ticket. Perry "bluntly" told a tattoo parlor owned that "he had killed someone and took the vehicles." Tr. Vol. 16 at 212-13. A witness testified that Perry was laughing and making jokes when admitted to jail after his arrest for murder. Tr. Vol. 17 at 188. Perry told a nurse at the jail that he killed a woman. Tr. Vol. 17 at 187.

Perry's Defense at Trial

Perry's defense focused on undercutting his confession. Perry called a paramedic, a crime scene technician, a police officer, and two nurses who observed him around the time of his arrest. Perry relied on these witnesses to argue that his intoxication, exposure to the elements, and the injuries he sustained in the Izusu's crash impaired his ability to make a voluntary confession.

Perry himself took the stand.[11] After giving a detailed history of his life, *Perry* alleged that he did

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[11] On state habeas review, the trial prosecutor provided an affidavit that described the effect Perry's testimony had on the defense.

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not voluntarily confess. Perry did not complain that the police beat him or coerced him in any way. Perry claimed instead that blood loss, intoxication, and excitement over his arrest put him in a "mind state [where he] was that he was going to tell this man, [Detective] Mace, anything he wants to hear to get him away from [him] to get . . . out of this situation . . . [H]e was hungry, tired and just fed up[.]" Tr. Vol. 18 at 85. Perry claimed that he had no involvement in Ms. Stotler's murder, blaming the killing instead on Burkett.

The prosecution engaged Perry in a blistering cross-examination that challenged each element of his self-serving testimony and highlighted Perry's history of profound behavioral problems. During cross-examination, the prosecution had Perry admit that, while incarcerated, he wrote Burkett a letter

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> In my opinion, once the trial court ruled that Mr. Perry's confessions were admissible, Mr. Cantrell understood that the ultimate issue in the case was punishment and trying to get Mr. Perry a life sentence. I distinctly recall that when Mr. Perry said he was going to testify, that Mr. Cantrell spoke with Mr. Perry and was obviously trying to persuade him from doing so. Mr. Perry's decision to testify, and the manner in which he testified, destroyed any possible trial strategy that Mr. Cantrell had in arguing that Mr. Perry gave his confession because he was remorseful for the murders, and that he was mentally unsound due to the long history of mental illness and drug and alcohol addition in his genetic makeup.

State Habeas Record at 1839.

describing how they could "beat" their case by asking Megan Lazrine to testify that Perry invoked his right to counsel when arrested. Tr. Vol. 18 at 220.[12] The jury found Perry guilty of capital murder.[13]

The Prosecution's Punishment Phase Evidence

Under Texas law, a capital-murder conviction makes a defendant eligible for a death sentence, with his fate determined after the jury answers two questions. The jury had to decide (1) if Perry would be a future danger and (2) whether mitigating evidence required the imposition of a life sentence. The centerpiece of the prosecution's case was Perry's confession that, on the night he shot Ms. Stotler, he also helped Burkett kill her son Adam and another person. The prosecution presented the jury with the remainder of Perry's confession, explaining what happened after he killed Ms. Stotler and then picked Kristin Willis up from work:

> We picked up Kristen [Willis] and drove back to Adam's subdivision.

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[12] Ms. Lazrine, in fact, had testified that Perry did not ask to speak to an attorney. Tr. Vol. 16 at 44.

[13] Perry and Burkett were tried separately. A jury convicted Burkett of capital murder but he received a life sentence. *See Burkett v. State*, 172 S.W.3d 250 (Tex. App. – Beaumont 2005, writ ref'd).

Jason drove, Kristen sat in the middle, and I sat on the passenger's side. We still had the shotgun with us. When we got to the subdivision, we could not get in, because we did not know the gate code. We knew that Adam would be home soon so we waited at the gate, and Adam pulled up in the white Isuzu Rodeo with another guy I know as Jeremy in the passenger seat. While Jason, Kristen, and I waited at the gate for Adam, we agreed on a story to tell Adam. Jason and I told Adam and Jeremy that a friend of ours had shot himself while we were all hunting squirrels, and we needed their help to get him.

We left the front of the subdivision and turned right onto the road in front of the subdivision. We were still in the truck, and Adam and Jeremy followed us in the Isuzu Rodeo. We then came to a stop sign and turned right. We then took the first left off that road and crossed the railroad tracks. We drove down a dark, winding road and stopped at I think was the first dirt road on the left. We all parked there, and Jason, Jeremy, Adam, and I started walking back into the woods off the dirt road. Kristen sat in her truck. After we walked awhile, Adam realized where we were and said that he knew an easier way to get to our friend.

Adam and I went back to Adams [*sic*] Isuzu, and Jason and Jeremy stayed in the woods. Adam drove me in his Isuzu to the 1st subdivision on the left off of the same road we

were on. Adam said that there was a road that went into the area we had earlier walked to. I think we turned onto the first road on the left in that subdivision and stopped at a cul-de-sac.

Adam and I got out of the Isuzu and we saw Jason walking toward us with the shotgun. Jason asked if we heard the gunshots and said that he was trying to let us know where he was. I told him that I had heard two to three shots. Adam then walked toward Jason, who did not have Jeremy with him, and Jason told him that he (Jason) would take Adam to where the others supposedly were. I walked back to get my cigarettes, and I saw Jason shoot Adam in the left side. I then covered my eyes. I heard a second gunshot and uncovered my eyes. I then saw Jason lean in close to Adam and fire a third shot at close range. I walked over to Adams [*sic*] body and got his car keys out of his pocket.

Jason and I then went to the Isuzu, and Adam [*sic*] got in the drivers [*sic*] side with me in the passenger side. We went back to where Kristin [*sic*] was waiting, and Kristen asked Jason, "What happened" and then said, "Never mind I don't want to know." Jason then said, "You're right, you don't want to know." Kristen's sister called, and Kristen was upset and said she was going home. Kristen left in her truck, and Jason drove me back to Adam's subdivision.

> I took the keys to the Camaro off of Adam's key ring for the Isuzu, and I jumped the fence and ran to Adam's house. I got in the Camaro, which was parked in the garage and drove it out of the garage. I pressed the button to close the garage door, but it would not close so I drove off. I drove out of the gate, met Jason, and we left to go to our trailer. Jason drove the white Isuzu with the shotgun in it, and I drove the red Camaro. We went home, smoked several cigarettes, and then got cleaned up and went to Nite Life.
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> The shotgun we used came from a burglary that Jason and I did on Ave. E by the Salvation Army. Jason and I both know the homeowner, and he drives a green Ford Ranger. We took a Glock .40 and a 12 gauge defender out of the house. The 12 gauge defender is the shotgun we used to kill Adam's mom, Adam Stotler, and Jeremy.

I also took Adam's wallet out of his Isuzu with his driver's license. Tr. Vol. 23 at 29-32; State's Exhibit 14. The prosecution called several witnesses who verified that the police found the bodies in the location described by Perry and that other evidence confirmed the details Perry gave in his confession.[14]

The prosecution presented additional evidence showing that, because of his past behavior, Perry

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[14] In particular, the police called Ms. Willis again in the punishment phase to describe her observations on the periphery of the three murders.

would be a future threat to society. The prosecution elicited extensive and significant testimony about Perry's life-long behavioral and psychological problems. Perry was diagnosed with "oppositional defiant disorder" and "conduct disorder" while in seventh and eighth grade. The prosecution showed that these disorders are precursors to adult antisocial personality disorder. Perry had been admitted to psychiatric care facilities twice. Perry school records showed him to be disrespectful, defiant, and violently erratic.

Before age 15, Perry had engaged in numerous minor criminal actions, such as stealing his mother's jewelry and trying to pawn it, stealing and crashing his parent's vehicle, and breaking into and vandalizing a neighbor's home. Perry also had a history of running away from home. Perry was removed from his home at age 15 when he took a loaded shotgun, pointed it at his parents, and threatened them. Perry's parents then filed charges against him for damage to their home and stealing their car. Perry was "court-ordered to attend a long-term facility for health care." Tr. Vol. 26 at 30. Perry then spent the remainder of his juvenile years in treatment facilities, including a program in Nebraska called Boy's Town and one in Mexico called Casa by the Sea. The prosecution presented testimony of Perry's disruptive acts and violent threats while in various youth facilities. Stealing, verbal combativeness, violent threats, unpredictable aggressiveness, drug use, running away, and physical aggression marked his behavior while in youth facilities.

When Perry left the Casa by the Sea program after turning age 18, he was essentially homeless other than for brief periods. During that time, Perry used alcohol and illegal substances. Perry supported himself by selling stolen pills and other stolen items. While living in a homeless shelter, Perry expressed little concern for the consequences of his criminal conduct because "his parents would be able to get him out of trouble because of the money they had." Tr. Vol. 23 at 176. Weeks before the murders, Perry was arrested for presenting a fake prescription for drugs. Perry also burglarized a home to steal the shotgun he used to kill Ms. Stotler. When arrested while driving Adam Stotler's car, he was belligerent and repeatedly lied to the police. When incarcerated for capital murder, he was "very unruly," was "very verbally belligerent, screaming and hollering," and would "[r]eally get[ ] all the other inmates riled up." Tr. Vol. 25 at 86-88. Perry was not compliant with correctional officers and tried to assault them.

The prosecution presented testimony showing that this was not Perry's only display of lethal violence. The police arrested Perry six months before the victim's murder for deadly conduct after he shot at a house. Perry told a friend that he had "done a drive-by on the Latin Kings" gang. Tr. Vol. 24 at 188. Perry did not have a good record while previously incarcerated. When in jail after his arrest for falsifying a prescription, he threatened to kill another inmate. Tr. Vol. 25 at 54.

The prosecution also called Dr. Dan Daly, a psychologist who was the associate executive director of the Boy's Town facility. Dr. Daly testified that when he came to Boy's Town, Perry had Attention Deficit and Hyperactivity Disorder ("ADHD") and a low level of depression. Tr. Vol. 23 at 106-07.[15] Dr. Daly described Perry made threats against teachers and their families at Boy's Town. Tr. Vol. 23 at 104-05. He also described physical aggression by Perry. Tr. Vol. 23 at 114. While Perry showed some improvement at Boy's Town, he was still combative, argumentative, violent, and lacked internal controls over his impulses. Tr. Vol. 23 at 125-26, 136-37. Perry was kicked out of the program when he refused to apologize for crude insults he made to a teacher.

The Punishment Phase Defense

The record suggests that trial counsel's punishment-phase strategy was twofold: (1) present evidence, both for its mitigating effect and to challenge the prosecution's future-dangerousness case, of how various aspects in Perry's background (such as ADHD) influenced his behavior and (2) show that a life sentence would place Perry in prison until his violent tendencies mellowed or extinguished. The defense first called Perry's biological mother, Jeanie Valionas,

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[15] Dr. Daley [sic] testified that, "[i]t is more difficult for them, but [youth with ADHD] can lean [sic] moral correctness" and that ADHD was not to "blame . . . for criminal behavior." Tr. Vol. 23 at 93-94.

as a witness. Ms. Valionas testified about her extensive alcohol and drug use before she became pregnant with Perry at age seventeen. Tr. Vol. 25 at 115-17, 122. She was hospitalized as suicidal in a psychiatric unit several times. Tr. Vol. 25 at 118. During the early months of her pregnancy she used drugs and alcohol every day and continued to do so even when she found out that she was pregnant. Tr. Vol. 25 at 124-25. She only stopped her drug and alcohol use a month or two before Perry was born. Tr. Vol. 25 at 126. She also smoked throughout her pregnancy. Tr. Vol. 25 at 136. She lied about her substance abuse on the adoption forms. Tr. Vol. 25 at 132. Ms. Valionas testified that she had a family history of alcoholism. Tr. Vol. 25 at 137.[16] Perry's maternal biological grandfather testified about his family's history of substance abuse and psychological problems. Tr. Vol. 25 at 154-68. The defense's closing argument used testimony from Perry's biological family to assert that "the Perry's never had [information about his family's substance abuse and mental health issues] nor did anybody that was treating or attempting to treat Michael Perry. Never had it. Never had that information." Tr. Vol. 27 at 37.

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[16] Medical records admitted by the prosecution showed that Perry "was adopted at three days of age. His biological mother allegedly smoked marijuana until the time she learned she was pregnant at which time she quit." Tr. Vol. 25 at 32. On cross-examination, the prosecution showed that Perry was delivered full term and was healthy at birth. Tr. Vol. 25 at 145.

Members of Perry's adoptive family testified on his behalf. Perry's adopted aunt, Joy Ullstrom, and his adopted cousins, Ann and James Ullstrom, testified about Perry's youth and related that he had never been violent. They were aware that he had been diagnosed with ADHD. Perry's adoptive father and mother testified. Perry was always "a difficult child" and had behavior problems at a young age. Tr. Vol. 26 at 14, 203-04. After struggling in first grade, Perry was diagnosed with Attention Deficit Disorder ["ADD"] and "began seeing a doctor and a counselor then. . . . He started taking Ritalin and then [the family] took family counseling . . . and joined a support group[.]" Tr. Vol. 26 at 18-19, 207. The school Perry attended made accommodations for his learning problems. By the end of seventh grade a psychologist diagnosed Perry with oppositional defiant disorder. Later, he was diagnosed with a conduct disorder. Tr. Vol. 26 at 28, 212. Perry began getting in trouble with the juvenile authorities for breaking into houses and stealing automobiles, including his parents' car. Perry was "determined adjudicated and court-ordered to attend a long-term facility for health care." Tr. Vol. 26 at 30, 217-18.

Perry's parents sent him to a youth program in Florida. Perry was soon kicked him out of that program. Perry was twice hospitalized for mental-health issues. His treatment stalled, however, when a psychologist with whom he had a good rapport committed suicide. Tr. Vol. 26 at 31-32. In October 1997, Perry started living at the Boy's Town youth

program in Nebraska. While Perry's parents wanted him to graduate from that program, Perry did not want to be there. He was kicked out of the Boy's Town program. Tr. Vol. 26 at 34-36. Perry then went to the Casa by the Sea program in Mexico. When he turned 18, Perry chose to leave that program. His parents had previously agreed that he could only return to their home if he was drug free, not in trouble with the law, and had a job. Tr. Vol. 26 at 44. Perry could not comply and initially could not return to the Perry home. Tr. Vol. 26 at 43-44.

When Perry decided to leave the Casa by the Sea program, employees of the program drove him north to San Diego, gave him $50, and left him. Tr. Vol. 26 at 43. Over the next few years, Perry briefly participated in the Job Corps program, held various jobs, and sometimes lived with his parents when he could live by their rules. Tr. Vol. 26 at 44-46. Though Perry caused his parents "continual trouble," they still loved him and hoped he would receive a life sentence. Tr. Vol. 26 at 46-47, 231.[17] The defense's closing argument emphasized how his parents would "never give up . . . They will continue to love [Perry]." Tr. Vol. 27 at 41.

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[17] Perry's father, in fact, testified that he wished he had gotten his son into the Casa by the Sea program sooner because then "things would have been different." Tr. Vol. 26 at 78. The prosecution's extensive cross-examination filled in the otherwise vague details about the extent and severity of Perry's behavioral problems.

An administrator at the Casa by the Sea youth facility, testified that Perry did not have any serious discipline problems or show violent behavior while there. An administrator at the Boy's Town youth facility, testified that Perry did not assault anyone. The prosecution's cross examination, however, revealed that Perry had some discipline problems, and specifically made several verbal threats, while in those programs. Trial counsel used that testimony to argue that Perry "flourished in that environment" that was "extremely regimented," suggesting that he would not be violent in prison if given a life sentence. Tr. Vol. 27 at 38.

A former member of Texas' parole board testified about the consequences of a death sentence. He explained that decades would elapse before Perry would be eligible for parole if given a life sentence. Trial counsel's closing argument focused on that testimony to assert that

> 40 years day for day I submit to you is a lifetime. It's a life of doing time – doing time in chains. . . . It's the most structured environment we have. You are told when to get up. You are told when to go to bed. You are told when to eat, what to wear and where to be every minute of the day. You have no choice. It's the hardest regimen in the State of Texas. No sentence that exists under the Texas Penal Code is longer than a capital life sentence.

Tr. Vol. 27 at 26-27.

The defense also relied on expert witnesses in the punishment phase. Dr. Gilda Kessner, clinical psychologist, interviewed Perry twice before trial, reviewed relevant records, and put together "a mitigation package." Tr. Vol. 26 at 90. Dr. Kessner testified that Perry's "greatest risk factor [for being a future danger] is his age." Tr. Vol. 26 at 133. Dr. Kessner opined that if Perry could go ten years in jail without acting out violently, his risk of future violence dropped to zero. Tr. Vol. 26 at 133-34.[18] Trial counsel's closing argument relied on Dr. Kessner's testimony to assert that Perry would not be a risk in prison and would only be eligible for parole when he was a "feeble old man." Tr. Vol. 27 at 27-29.

Dr. Kessner also reviewed the details of Perry's life and identified how his ADHD had impacted his behavior. Dr. Kessner testified that as a youth several psychological diagnoses applied to Perry, including oppositional defiant disorder, conduct disorder, and depression, though these were actually only manifestations of his ADHD. Tr. Vol. 26 at 101. Dr. Kessner also testified that, when he left the Casa by the Sea program at age 18, Perry's "maturity level is probably more like 15." Consequently, he spent time in California either homeless or living with people who

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[18] While Perry's older brother had been sexually abused by a babysitter who had access to both children, nothing indicated that Perry had been sexually abused. Tr. Vol. 26 at 152-53. Perry, however, reported that his brother "grabbed him in his private parts." Tr. Vol. 26 at 154.

took advantage of him for sexual favors. Tr. Vol. 26 at 115-16. He also began using drugs. Tr. Vol. 26 at 117. Dr. Kessner testified on cross-examination that the murder was related to Perry's ADHD which caused his "immaturity of judgment, poor decision making, and his impulsivity." Tr. 26 at 186. Dr. Kessner suggested that the treatment Perry received failed to appreciate the continuing influence of ADHD on his behavior. Tr. Vol. 26 at 109-10. Because of that, Perry's counsel argued that it was "impossible to treat Perry properly because there never was the proper evaluation." Tr. Vol. 27 at 39.[19]

On rebuttal, the prosecution called Dr. Walter Quijano, a psychologist, who testified that the killing was not an impulsive act. Dr. Quijano did not attribute Perry's behavior problems to ADHD. Dr. Quijano opined that Perry's lack of a conscience and early psychological diagnoses were a manifestation of his antisocial personality disorder. On cross-examination, however, Dr. Quijano admitted that he never examined or interviewed Perry before coming to his conclusions. Trial counsel's closing argument attacked the "audacity of the State" in calling Dr. Quijano because his "methodology" made the Attorney General "confess error in [many] capital murder cases" because he used "race as a factor in determining

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[19] The prosecution's cross-examination challenged Dr. Kessner's conclusions in comparison the Perry's record of aggressive and violent behavior.

future dangerousness."[20] Trial counsel also undercut the reliability of Dr. Quijano's testimony because he never interviewed Perry. Tr. Vol. 27 at 43.

The jury answered Texas' special issue questions in a manner requiring the imposition of a death sentence. The trial court sentenced Perry to death.

Post-Trial Proceedings and Federal Review

Perry unsuccessfully sought state appellate and habeas review of his conviction and sentence. In recommending that the Court of Criminal Appeals deny relief, the state habeas court issued extensive factual findings relating to Perry's claims. This federal habeas action follows.

As an initial matter, the Court notes that Perry's habeas petition contains many broad arguments and his voluminous attachments contain much tangential information. This Court's role on habeas is not to sort through each factual allegation, reweigh all the evidence, and retry the case. A narrower, more focused inquiry defines habeas jurisprudence and constricts

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[20] While Dr. Quijano did not use race as a consideration for determining future dangerousness in this case, his testimony to that effect in other cases resulted in several death sentences being thrown out. *See Saldano v. Roach*, 363 F.3d 545, 549 (5th Cir. 2004) (describing how Dr. Quijano "opined that there was a correlation between race and ethnicity and future dangerousness," noting how the Attorney General of Texas confessed error thus requiring resentencing, and observing that Dr. Quijano's testimony tainted many cases).

this Court's habeas review. This Court will only address the habeas claims expressly laid out in the section entitled "claims for relief" in Perry's amended petition. In that light, Perry raises seven habeas claims:

1. The prosecution suppressed evidence from Perry's defense attorneys.

2. Trial counsel provided ineffective assistance.

3. The state habeas court made unauthorized factfindings based on an inadequate evidentiary support and without holding a hearing.

4. Texas' method of putting mitigating evidence before the jury and then reviewing that evidence on appeal violates the Constitution.

5. The prosecution adduced false and misleading testimony through an expert witness.

6. The Constitution exempts Perry from execution because his mental state is comparable to juveniles who are protected against execution.

7. Cumulative error infected his trial with fundamental unfairness.

Respondent has moved for summary judgment. Perry has responded to the summary judgment motion and asks this Court to allow him to engage in factual development before adjudicating his claims.

LEGAL STANDARDS

"The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983); *see also Moore v. Dempsey*, 261 U.S. 86, 87-88 (1923) ("[W]hat we have to deal with [on habeas review] is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved."). "Accordingly, federal habeas proceedings honor the "presumption of finality and legality [that] attaches to [a petitioner's] conviction and sentence." *Id.* at 887. Federal courts give effect to the traditional limits on habeas relief through the AEDPA's deferential standards of review. "Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, and to further the principles of comity, finality, and federalism[.]" *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (quotation and citation omitted). The Anti-Terrorism and Effective Death Penalty Act ("AEDPA") requires federal deference to both legal determinations and fact findings made by state courts.

Legal Deference

The AEDPA forbids habeas relief on issues "adjudicated on the merits" in state court unless the state decision "was contrary to, or an unreasonable application of, clearly established Federal law" or "was based

on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). The Supreme Court holds that a state court decision is "contrary to" federal precedent when the state court arrives at a conclusion "opposite to that reached by [the Supreme Court] on a question of law" or "the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413 (2000); *see also Bell v. Cone*, 535 U.S. 685, 698 (2002); *Early v. Packer*, 537 U.S. 3, 7-8 (2002). A state court unreasonably applies federal law when it "identifies the correct governing legal rule from [the Supreme Court] cases but unreasonably applies it to the particular facts of the particular state prisoner's case" or when "the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407.[21]

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[21] A petitioner's compliance with the AEDPA legal deference alone does not entitle him to habeas relief. *See Horn v. Banks*, 536 U.S. 266, 272 (2002) (remarking that no Supreme Court case "ha[s] suggested that a writ of habeas corpus should automatically issue if a prisoner satisfies the AEDPA standard[.]"); *Robertson v. Cain*, 324 F.3d 297, 306 (5th Cir. 2003) (finding that 28 U.S.C. § 2254(d) "does not require federal habeas courts to grant relief reflexively"). Other judicial doctrines, such as the harmless-error doctrine and the non-retroactivity principle, bridle federal habeas relief. *See Thacker v. Dretke*, 396 F.3d 607, 612 n.2 (5th Cir. 2005). This Court

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Factual Deference

The AEDPA also rigorously requires federal deference to state factfinding unless a petitioner presents clear and convincing evidence in rebuttal. *See* 28 U.S.C. § 2254(e)(1). The state habeas court issued detailed and thorough factfindings in this case. Perry's briefing asks this Court not to defer to those findings for two reasons. First, Perry alleges that this Court cannot presume the fact findings correct because they rest on an insufficiently authenticated evidentiary basis. Specifically, Perry objects that the signed, dated, and notarized statements by trial counsel should not have been considered "affidavits" under Texas law because they lacked one element: they did not expressly affirm that the statements were "true."[22] Second, Perry faults the integrity of the

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cannot issue the writ issue unless error "ha[d] a 'substantial and injurious effect or influence in determining the jury's verdict.'" *Robertson*, 324 F.3d at 304 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 629 (1993); *see also Aleman v. Sternes*, 320 F.3d 687, 690-91 (7th Cir. 2003) ("Nothing in the AEDPA suggests that it is appropriate to issue writs of habeas corpus even though any error of federal law that may have occurred did not affect the outcome."). A habeas court likewise cannot grant relief if it would require the creation and retroactive application of new constitutional law. *See Horn*, 536 U.S. at 272 (relying on *Teague v. Lane*, 489 U.S. 288 (1989)).

[22] This Court does not sit in habeas to interpret state law. *See Wood v. Quarterman*, 503 F.3d 408, 414 (5th Cir. 2007); *Amador v. Quarterman*, 458 F.3d 397, 412 (5th Cir. 2006). Texas law governs the admissibility of evidence in habeas proceedings and this Court does not sit as a super-state appellate court to overturn evidentiary rulings. *See Wood*, 503 F.3d at 414. Perry

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fact findings because the Court of Criminal Appeals "failed to hold an evidentiary hearing and summarily

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shows no provision of the Texas Rules of Evidence or of Texas statutory law that renders his trial attorneys' affidavits automatically inadmissible. He cites Texas Supreme Court, Texas civil court, and federal law for the proposition that the submitted documents were insufficient to constitute a properly verified affidavit, but has not shown that the Court of Criminal Appeals considers similar affidavits to be an unreliable basis to make factfindings on habeas review. Perry gives no reason for this Court to assume that the statements that were signed and sworn by two members of the bar – and likely lacking the complained-of authentication only through oversight – were unreliable. Importantly, Perry raised no objection to the statements in state court. The state habeas court, which was the proper forum for Perry to make his evidentiary complaints, considered the statements to be valid and credible affidavits. This Court will defer to that state-court decision.

The Court pauses to note the irony in Perry's criticism of relying on trial counsel's statements. Perry has also presented the Court with unauthenticated statements, such as that allegedly given by Megan Lazrine (Docket Entry No. 6 at 20) and Victor Neal (Docket Entry No. 6 at Exhibit 13), and has asked the Court to treat them as valid. Perry also asks this Court to assume that letters written by Burkett provide exculpatory information. The Court of Criminal Appeals, however, recently took the extraordinary step of barring Burkett from filing any habeas action because he "abused the Great Writ by submitting false evidence." *Ex parte Burkett*, 2007 WL 4126375 (Tex. Crim. App. Nov. 21, 2007). While the record does not conclusively prove that Perry relies on the same evidence (such as the statement by Megan Lazrine), the Court must approach letters allegedly written by Burkett and related statements attributed to others with great caution. To that end, and in compliance with the spirit and letter of habeas law, the Court looks to the state court's fact finding as a guide.

adopted trial court's findings and conclusions[.]" (Docket Entry No. 4 at 114).

The AEDPA provides only one means by which a federal court can ignore state factfindings: when a petitioner "rebut[s] the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).[23] Even though Perry alleges that in procedure or in evidentiary rulings he did not receive a full or fair state hearing, the Fifth Circuit has repeatedly held that "a full and fair hearing is not a precondition to according § 2254(e)(1)'s presumption of correctness to state habeas court findings of fact." *Valdez v. Cockrell*, 274 F.3d 941, 951 (5th Cir. 2001); *see also Morrow v. Dretke*, 367 F.3d 309, 315 (5th Cir. 2004); *Bass v. Dretke*, 82 Fed. App'x. 351, 354 (5th Cir. 2003).[24] This

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[23] On its face, the AEDPA does not concern itself with the nature, quality, or depth of the state fact finding procedure. Importantly, section 2254(e)(1) does not endorse a challenge to state factfinding based on general arguments; but requires a petitioner to submit *evidence* to overcome state fact findings. *See Duncan v. Cockrell*, 70 Fed. App'x. 741, 745-46 (5th Cir. 2003) (differentiating between arguments against applying the presumption of correctness and evidence rebutting the presumption). The statute on its face requires a petitioner to bring forth evidence if he wishes to avoid the presumption of correctness. Perry does not base his attempts to skirt the presumption of correctness on evidentiary material but only on argumentation.

[24] On that basis, the Court denies Perry's claim that the state courts made unauthorized fact findings, particularly since infirmities in state habeas proceedings do not provide a cognizable ground for habeas relief. *See Brown v. Dretke*, 419 F.3d 365, 378 (5th Cir. 2005); *Moore v. Dretke*, 369 F.3d 844, 846 (5th Cir.

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Court will consider the state factfings [sic], including those based on trial counsels' statements, to be correct unless proved otherwise by the appropriate legal standard.[25]

Summary Judgment

Respondent has moved for summary judgment. Perry argues that, since he disputes the state factfindings, summary judgment is inappropriate at this stage. Summary judgment is proper where the record shows "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). In ordinary civil cases, a district court considering a motion for summary judgment must construe disputed facts in a light most favorable to the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."). "As a general principle, Rule 56 of the

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2004); *Beazley v. Johnson*, 242 F.3d 248, 271 (5th Cir. 2001); *Nichols v. Scott*, 69 F.3d 1255, 1275 (5th Cir. 1995).

[25] Perry has filed a motion for discovery which, based on his allegation that no valid factfindings exist because of procedural deficiencies in trial counsel's affidavits, seeks to depose his trial attorneys. (Docket Entry No. 20). The record contains comprehensive, detailed statements from both trial attorneys. The state habeas court found those statements to be credible. Perry shows no meaningful reason other than his superficial procedural argument to revisit that testimony. The Court will deny Perry's discovery request.

Federal Rules of Civil Procedure, relating to summary judgment, applies with equal force in the context of habeas corpus cases." *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir. 2000). However, a court on summary judgment must view the evidence through "the prism of the substantive evidentiary burden." *Id.* at 254. Congress, through the AEDPA, has constricted both the nature and availability of habeas review. This Court, therefore, applies general summary judgment standards only insofar as they do not conflict with the language and intent of the AEDPA. *See Smith v. Cockrell*, 311 F.3d 661, 668 (5th Cir. 2002) ("[Rule 56] applies only to the extent that it does not conflict with the habeas rules."), *overruled on other grounds by Tennard v. Dretke*, 542 U.S. 274 (2004). Accordingly, where the state courts have already resolved a prisoner's factual allegations by express or implicit findings, and the prisoner fails to prove by clear and convincing evidence that 28 U.S.C. § 2254(e)(1)'s presumption of correctness should not apply, construing facts in his favor is inappropriate and unauthorized.

ANALYSIS

I. Claims Relating to Trial Counsel's Representation

Perry raises several complaints about his defense attorneys' efforts in the guilt/innocence and punishment phases of trial. Because Perry's ineffective-assistance claims are his best-developed ones, and

full discussion of their merits informs adjudication of his other claims, the Court first turns to his complaints about trial representation.[26]

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. 668, 686 (1984). Two standards govern claims of ineffective representation. In extreme cases in which counsel's assistance was constructively equivalent to no legal representation, *United States v. Cronic*, 466 U.S. 648 (1984), requires a court to assume that trial counsel prejudiced his client's defense. *Cronic* "presume[s] ineffectiveness without inquiring on a case-by-case, error-by-error basis into the wisdom of counsel's actual performance (and any resulting prejudice)." *Bell v. Quintero*, ___ U.S. ___, ___, 125 S. Ct. 2240, 2243 (2005). Most claims of ineffective assistance, however, fall under *Strickland* which requires a petitioner to show deficient performance by his attorney that prejudiced his defense. Under the *Strickland* standard, a criminal defendant's Sixth Amendment rights are "denied when a defense attorney's performance falls below an objective standard of reasonableness and thereby prejudices the defense." *Yarborough v. Gentry*, 540 U.S. 1, 4 (2003); *see also Wiggins v.*

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[26] Again, while Perry makes many statements impugning his trial attorneys' efforts, this Court will only specifically address those claims briefed as grounds for relief.

Smith, 539 U.S. 510, 520 (2003). "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Strickland*, 466 U.S. at 700. Well-settled case law defines the contours of *Strickland*'s two tests.

Perry claims that trial counsel wholly failed to oppose the prosecution's penalty-phase case, bringing this case under the *Cronic* standard. According to Perry, "the constitutionally deficient performance of trial counsel in the sentencing phase in failing to subject the prosecution's case to meaningful adversarial testing was complete." (Docket Entry No. 4 at 59). *Cronic* applies only "in only a very narrow spectrum of cases where the circumstances leading to counsel's ineffectiveness are so egregious that the defendant was in effect denied any meaningful assistance at all." *Gochicoa v. Johnson*, 238 F.3d 278, 284 (5th Cir. 2000); *see also Haynes v. Cain*, 298 F.3d 375, 381 (5th Cir. 2002) ("*Cronic* is reserved only for those extreme cases in which counsel fails to present any defense."). Courts use *Cronic*'s constructive denial of counsel standard sparingly and only when counsel's representation amounts to no representation. *See Haynes*, 298 F.3d at 381; *Gochicoa*, 238 F.3d at 284. In arguing that *Cronic* should apply, Perry ignores trial counsel's efforts. Trial counsel cross-examined the State's witnesses, called several defense witnesses, presented a vibrant case for mitigation, made a forceful closing argument, and otherwise zealously defended against a death sentence. Even a cursory review of the record reveals that trial counsel did not "entirely fail[ ] to

subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 659. To merit relief, Perry must meet *Strickland*'s deficient performance and actual prejudice tests. Perry must then prove that the state court's adjudication of his claims was contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

Perry raises the following specific complaints about trial counsel's representation:

1. Failure to interview possible witnesses including inmates who would show his innocence.

2. Failure to adequately challenge the admissibility of Perry's confession.

3. Failure to prevent the prosecution from discussing Perry's prior bad conduct.

4. Failure to seek a continuance after the death of one attorney's parents.

5. Failure to investigate and present adequately evidence of Perry's mental illness and family problems.[27]

The Court will consider his ineffective-assistance-of-counsel claims in turn.

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[27] Perry also claims that trial counsel failed to prevent a prosecution witness' false testimony. The Court will consider that argument with Perry's claim that the expert's testimony violated the Constitution.

A. Interview Potential Witnesses

Perry faults his attorneys for not interviewing three inmates once housed in the Montgomery County Jail (Jeremy Vogel, Jason Edward Middleton, and Patrick Ybarbo Sedillo), each of whom would have testified about jailhouse conversations they had which identified Burkett or Kristin Willis as the murderer. Perry claims that trial counsel had a duty to make a thorough investigation, the results of which would have uncovered the inmates' testimony. Perry contends that this investigation would have allowed his attorneys to craft a [sic] effective defense showing that he was innocent.

Vogel, Middleton, and Sedillo all provided affidavits in state court. Vogel's affidavit explains that he met Burkett in 1997. Vogel said that Burkett has controlling and manipulating personality. Vogel stated he had a conversation with Kristin Willis in which she suggested that she had been involved in the murders While she never gave him specific details, Ms. Willis allegedly told him "what 'a rush' the whole incident (regarding the murders) had been" and "she would do it again and that she really didn't have any remorse about the murders." Vogel also related that while incarcerated at the same time as Perry and Burkett, he heard from another inmate (James Middleton) "that it was Burkett who planned everything." Vogel also heart rumors that "Kristin Willis was the one that had gotten the gun" and that Burkett had "hits . . . out on Perry during that time in Montgomery County Jail." State Habeas Record at

24-51. Ms. Willis provided an affidavit that disclaimed knowing Vogel of having any conversation with him. State Habeas Record at 174-75.

Middleton, then a trustee in the Montgomery County Jail, claimed to have had many conversations with Burkett. Middleton described Burkett as a mean, controlling man and Perry as one who sought approval from others. Middleton claimed that Burkett "hinted . . . that he made Michael Perry shoot the woman, so Perry could not snitch Burkett off for the murders of the two boys."[28] Middleton said that he knew that Burkett was angry with Perry for trying to recant his statement before trial. State Habeas Record at 253-57.

Sedillo stated that, while in the Montgomery County Jail, he heard Burkett "brag[] about being confident in beating his cases, even though Michael Perr[y] had named him as shooting a female victim, he referred to as, 'the old Lady.'" Burkett said that, even if he did do it, his "girlfriend [Kristin Willis] loves [him] so much, she will take the rap, because her Dad's a cop and she'll get off easy." Sedillo recounted a conversation with Middleton where he said that "Burkett had conveyed that Perry had not killed the woman. Burkett allegedly said he had shot

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[28] Middleton does not explain how Perry could be forced to kill Ms. Stotler so that he would not "snitch Burkett off for the murders of the two boys" when, by all accounts, the boys had not yet been murdered when Perry shot her. *See* FFCL, p. 6 at ¶41.

the woman, blaming his drugged up condition made him loose [sic] control. . . . Burkett had described how he had (at the time of the incident) felt a strong desire to kill someone just to see what it fell like. Burkett bragged about getting a rush off from the murders." Sedillo stated that Perry was "put on 24 Hour Lockdown for his own protection" because of Burkett's threats. State Habeas Record at 259-60.

On state habeas review, trial counsel Cantrell submitted an affidavit which stated that he and his investigator "would have relished the opportunity to interview (and if appropriate to subpoena to testify at trial) any potential witness(es) on behalf of [Perry], including jailhouse snitches. Moreover, [Perry] never supplied the name of a single person who possessed information that might have been helpful to [Perry] at trial." State Habeas Record at 1751. Mr. Cantrell noted that "Sedillo, Middleton, and Vogel . . . did not come forward until well after [Perry's] conviction for capital murder. Notwithstanding the above fact, none of these witnesses refute in any manner [Perry's] confession to the murder of Ms. Stotler during a robbery." State Habeas Record at 1752. Co-counsel Taylor affirmed that Perry "provided the names of no inmates in the Montgomery County Jail who could attest to claims/statements/threats allegedly made by JASON BURKETT toward [Perry]. [Perry] provided the names of no individuals who could attest to statements made by JASON BURKETT that JASON BURKETT killed Mrs. Stotler." State Habeas Record at 1760.

The state habeas court found, "[b]ased on the credible affidavit of Mr. Cantrell and Mr. Taylor, [that Perry] never provided the names of any person in the Montgomery County jails who had helpful information to his case." FFCL, p. 16 at ¶124.[29] The state habeas court specifically found that none of the inmates' affidavits were credible. FFCL, p. 8 at ¶59, pp. 14-15 at ¶¶105, 109. The state habeas court reviewed several reasons why the affidavits were not credible: each man had a significant criminal history, FFCL, p. 14 at ¶¶104, 107; nothing corroborated Vogel's affidavit and Ms. Willis denied knowing Vogel or confessing to him, FFCL, p. 7 at ¶¶50-55, 57-59;[30]

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[29] In state court, Perry himself submitted an affidavit that challenges trial counsel's statement that Perry did not give them the name of any witnesses. Perry stated that he gave his attorneys "a list of witnesses that would have been helpful to [his] case, with an explanation of how they would be helpful." (Docket Entry No. 8, Exhibit 42); State Habeas Record at 2361-69. Perry attached to his affidavit a handwritten list of potential witnesses which he allegedly gave to counsel before trial. That list includes Sedillo's name and the notation "heard [Burkett] say I had nothing to do with it." (Docket Entry No. 4, Ex. 42). Other than Perry's own statement, nothing in the record authenticates that Perry indeed drafted this list before trial and gave it to counsel. Perry has not given this Court any reason to suppose that, before trial, he knew of and informed trial counsel about statements Burkett allegedly made. The state habeas court's finding that counsel was credible in stating that Perry did not give them a list of witnesses amounts to a finding that Perry's affidavit in that regard is not credible.

[30] Vogel also claimed to have met Perry in an adult night club when Perry would have been 14 or 15 years old and not living in Texas. FFCL, p. 15 at ¶106.

and Sedillo did not have court hearings when he claimed to have been in the county facility and heard Burkett confess, FFCL, p. 15 at ¶108.

The state habeas court also found that the affidavits by the jailhouse informants would not have been as beneficial as Perry alleges. The state habeas court found that Middleton's statement about Burkett "getting a rush" from killing corroborated Perry's confession wherein he attributed two murders to Burkett. FFCL, p. 6 at ¶42. The state habeas court noted inconsistencies between the jailhouse inmates' accounts. Particularly, the state habeas court observed that Sedillo said that Middleton told him that Burkett killed the victim, but Middleton's affidavit claimed that Burkett made Perry shoot the victim. FFCL, p. 7 at ¶46. The affidavits claimed that Burkett had a "hit" out on Perry before trial for identifying Burkett as the killer, but "[t]he first time that [Perry] claimed not to have anything to do with Ms. Stotler's death was at his trial." FFCL, p. 7 at ¶¶48, 49. The state habeas court also found that the statements had to be considered in the context of the fact that "the evidence of [Perry's] guilt is overwhelming." FFCL, p. 12 at ¶88.

On federal review, Perry renews his claim that trial counsel should have contacted the three men and secured their trial testimony.[31] Perry has not

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[31] As an initial matter, Perry's claim that trial counsel failed to interview inmates cannot coexist with his *Brady* claim

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shown that trial counsel erred in not interviewing Vogel, Middleton, and Sedillo before trial. Under Supreme Court precedent, a trial attorney must make a reasonable investigation that will allow him to select among defensive strategies. *See Rompilla v. Beard*, 545 U.S. 374, 380-81 (2005); *Wiggins*, 539 U.S. at 523-25. Yet nothing requires an attorney to "investigate every conceivable line of . . . evidence no matter how unlikely the effort would be to assist the defendant[.]" *Wiggins*, 539 U.S. at 533; *Rompilla*, 545 U.S. at 383 ("[T]he duty to investigate does not force defense lawyers to scour the globe on the off-chance something will turn up."). Perry has shown nothing that would trigger counsel's duty to investigate and interview inmates in the county jail facility, especially since "[t]he first time that [Perry] claimed not have anything to do with Ms. Stotler's death was at his trial." FFCL, p. 7 at ¶49.

Even had trial counsel interviewed the three inmates, Perry has not shown that there would be a reasonable probability of a different result. The state habeas court found the men not to be credible. Perry has not disturbed that fact finding. The prosecution could surely paint these men out to be unreliable

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that the prosecution suppressed their testimony. If the prosecution suppressed information about the inmates' conversations, trial counsel cannot be faulted for not securing their testimony. If reasonable efforts by trial counsel should have brought forth the inmates' testimony, the prosecution cannot have suppressed it.

witnesses if called at trial. The substance of their testimony is contradictory, based on hearsay, disputed by competent evidence, refuted by known facts, and not as helpful as Perry alleges. Most important, the statements themselves do not refute, and in some aspects verify, Perry's detailed confession to the murder. The state habeas court could reasonably find no *Strickland* deficient performance or prejudice on this issue. Perry has not shown that the state court's rejection of this claim was contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

B. Admissibility of Perry's Confession

Perry claims that his trial attorneys inadequately challenged the admissibility of his confession. As previously noted, Perry began spontaneously making incriminating statements after his arrest. Detective Mace had to stop him so that he could deliver the *Miranda* warnings. Perry provided a detailed confession to his participation in the murder of the victim, her son, and another.

Trial counsel challenged the admissibility of Perry's confession before trial. The trial court held a suppression hearing. In the hearing, trial counsel argued that Perry did not make a "conscious, free, deliberate choice" to testify because he "was in bad physical condition. He had a head injury. He was bleeding profusely. He was exhausted. He hadn't slept in a long time. He was intoxicated." Tr. Vol. 3 at 18.

Trial counsel argued that, the day after his arrest, "once his head was clear," Perry invoked his right to counsel and would no longer speak with the police. Tr. Vol. 3 at 18. The police officers present at Perry's arrest and confession testified about his physical condition and the circumstances surrounding his statements. Nurses who observed him testified about the extent of his injuries. Friends testified about his alcohol use on the night before the arrest. Perry himself testified, explaining that his injuries, substance abuse, exposure to the elements, and sleeplessness made him unable to confess after deliberate thought. While Perry claimed that the police intimidated him by putting a gun in his face and throwing him to the floor, he did not claim that the police beat, abused, or coerced him in any way. In fact, the prosecution's cross-examination revealed that Perry specifically disclaimed that any police coercion influenced him:

The State:	Let me finish up by saying, how did you feel compelled to give a statement? What did the officers do to compel you to give a statement?
Perry:	Compel? You mean forced?
The State:	You said that. I didn't.
Perry:	I wasn't forced. I felt like – I don't recalled saying I was compelled, but –

The State: That's my point. You weren't compelled to give a statement, were you?

Perry: I don't recall saying I was.

Mr. Cantrell: Objection. Is [the prosecutor] testifying?

Trial court: I think –

Mr. Cantrell: The fact that he wasn't compelled – the fact that he wasn't compelled is [of] no import.

Tr. Vol. 3 at 232. The trial court found Perry's statements to be admissible.

Before the jury received its charge, trial counsel asked the trial court to instruct the jury not to consider his confession if Perry's intoxication and injuries interfered with his ability to confess knowingly and intelligently. The trial court refused to deliver the proposed instruction. Trans. at 583-85.

On direct appeal, Perry argued that the trial court should have given the jury his instruction that would allow them to find that his intoxication and injuries from the car crash rendered him unable to confess voluntarily. The Court of Criminal Appeals found: "Assuming that there is other evidence to support a finding that [Perry's] intoxication and injury overbore [his] will and caused him to confess, the evidence of [Perry's] intoxication and injury does not raise any constitutional voluntariness issues because this evidence does not involve any police

coercion or other official over-reaching." *Perry*, 158 S.W.3d at 446 (footnote omitted).

On state habeas review, Perry claimed that trial counsel should have done more to have his confession suppressed. Contrary to his previous testimony in the trial court, Perry alleged that the police severely beat and strangled him until he confessed. Perry faults trial counsel for not arguing that his confession resulted from police brutality. Also, Perry claimed that trial counsel should have hired an expert to testify that confessions are generally unreliable.

On state habeas court, Perry tried to support his claim. Perry provided affidavits from individuals who claimed that the officers involved in Perry's arrest had coerced confessions through violence in other cases. State Habeas Record at 263-64. Perry submitted photographs taken at a hospital after his arrest showing his bruised and bleeding body. State Habeas record at 270-80. Perry also provided articles discussing the possibility for false confessions in criminal cases. Additionally, Perry claimed that his time at one juvenile home – Casa by the Sea – made him, and other residents, more likely to confess to crimes. Perry also provided a detailed affidavit in which he described, blow by blow, the abuse he allegedly suffered that forced him to confess.

Perry's trial attorneys refuted the accusations of ineffective assistance in challenging his confession. Mr. Cantrell stated that Perry "never advised [him] that [Perry] had been assaulted by any person – law

enforcement or lay person – during the ambulance ride" but "explained . . . that all his injuries occurred during the period of time that [Perry] was attempting to elude and evade apprehension by law enforcement on the morning of the arrest." State Habeas Record at 1752. While trial counsel subpoenaed the file of a police officer and tried to show at trial that he had previously acted aggressively or coercively, Perry never suggested that coercion brought about his confession. State Habeas Record at 1753. Mr. Cantrell noted that "[w]itnesses were presented during the suppression hearing and trial who testified under oath that [Perry] was not physically abused in the ambulance trip to the hospital." State Habeas Record at 1752. Mr. Cantrell opined that securing an expert to testify on false confessions "would not have been made in good faith" because the testimony showed that Perry freely confessed, understood the *Miranda* warnings, and had been arrested before without making any confession. State Habeas Record at 1752-53. Mr. Cantrell stated that he had no information before trial "regarding any false confessions by former students of Casa by the Sea. . . . Moreover, his Casa by the Sea experience would have had nothing to do with the fact that Perry began confessing to the Capital Murder even before he was completely secured in the ambulance after his arrest and before his transportation to the hospital." State Habeas Record at 1751.

Co-counsel Mr. Taylor verified that Perry never told them that he had been coerced into confessing.

State Habeas Record at 1760. Specifically, Perry "never complained to [him] regarding any type of physical abuse during the ambulance ride" but that he "advised . . . that all of his injuries were sustained during the attempt to elude capture." State Habeas Record at 1760. Mr. Taylor confirmed that Perry's attorneys investigated the circumstances of the confession and the police officer's prior conduct. Mr. Taylor stated that Perry "never advised [him] that his confession was false, coerced, or involuntary." State Habeas Record at 1761.

The state habeas court made specific and detailed findings regarding Perry's confession. This Court recounts them at length due to their persuasive and conclusive nature:

> 19. Based on the recording of [Perry's] statement at the Conroe Regional Hospital, [Perry] was not in such great pain or fear that he could not give a true statement then or at the time of his arrest.
>
> . . .
>
> 22. Based on the reporter's record, Paramedic Bonnie Montgomery observed that Sgt. Blair was not hostile towards [Perry] and did not threaten him during the ambulance ride.
>
> 23. The Court is familiar with the reputation of and the effective assistance that trial counsel Don Cantrell and Stephen Taylor provided [Perry] and

have provided other defendants in the courts of Montgomery County.

24. Based on the credible affidavits of Mr. Cantrell and Mr. Taylor, [Perry] did not complain to counsel that he had been beaten or strangled during the ambulance ride after his arrest.

25. Based on the credible affidavit of Mr. Cantrell, [Perry] admitted that his injuries all occurred while he was trying to evade arrest.

26. Based on the reporter's record, [Perry] did not testify that he was beaten or strangled during the ambulance ride.

. . .

30. Based on the reporter's record, Mr. Davidson testified that on Monday night before [Perry's] arrest. [he] was "intoxicated," meaning he was starting to lose some of his control or abilities, not "falling down" drunk.

. . .

36. The reporter's record adequately reflects that [Perry] was drinking the night before his arrest.

. . .

116. Given the overwhelming evidence [of Perry's guilt], [Perry] fails to prove that he, like some of the students who

attended Casa by the Sea, gave a false confession.

117. Based on the reporter's record of the trial and the credible affidavit of Mr. Cantrell, whether some students who attended Casa by the Sea have given false confessions is irrelevant to whether [Perry] gave a false confession.

. . .

128. Based on the reporter's record and the Court's personal recollection, [Perry] voluntarily confessed his crime to Det. Carey Mace.

129. Based on the credible affidavit of Mr. Cantrell, the Court's personal recollection, and the reporter's record, Mr. Cantrell subpoenaed the personnel file of Montgomery County Sherif's [sic] Deputy Sidney Blair, attempted to prove up certain prior complaints against Deputy Blair, and made a Bill of Exceptions on those complaints.

130. Based on the credible affidavit of Mr. Cantrell, [Perry] never informed Mr. Cantrell that he had been assaulted or threatened by Deputy Blair during the ambulance ride.

131. [Perry] does not state, personally, that he was beaten or strangled during the ambulance ride, and the reporter's

record reflects that [Perry] did not complain about being beaten or strangled when he testified at his trial.

132. Based on the credible affidavit of Mr. Cantrell, Mr. Cantrell investigated the circumstances of [Perry's] ambulance ride.

133. Based on the credible affidavit of Mr. Cantrell, [Perry] never advised Mr. Cantrell that he had been assaulted by any person during the ambulance ride.

134. Based on the credible affidavits of Mr. Cantrell and Mr. Taylor, [Perry] explained to Mr. Cantrell that all of his injuries occurred when he tried to evade arrest.

135. Based on the tape-recorded statement of [Perry] at the hospital, and the Court's personal recollection, [Perry] did not complain about the ambulance ride in his recorded statement at the hospital and did not sound intimidated or coerced.

136. [Perry] did not dispute at trial or in his application Det. Mace's testimony that [Perry] "started talking immediately after I introduced myself, saying 'I know it's the needle and I want to save everybody the trouble and just confess' "

137. [Perry] did not dispute at trial or in his application Det. Mace's testimony that [Perry] had to be interrupted so that he

could give [Perry] his *Miranda* warnings.

138. Based on the credible affidavits of Mr. Cantrell and Mr. Taylor, [Perry] never told his trial counsel that his statement was false, coerced, or involuntary.

139. Based on the credible affidavit of Mr. Cantrell, all records reflect that [Perry] is well above average in intelligence, and perfectly capable of understanding the *Miranda* warnings.

. . .

141. [Perry] provides no argument or authorities in support of his suggestion that the Court of Criminal Appeals erred in concluding that evidence of [Perry's] intoxication and injury did not involve police coercion or over-reaching, and did not raise constitutional voluntariness issues.

142. [Perry] fails to show by a preponderance of the evidence that he was beaten or strangled or that his confession was coerced.

FFCL, pp. 5-6, 15-17. The state habeas court concluded that trial counsel did not provide ineffective assistance in not claiming that the police coerced Perry's confession.

Perry again raises his claim that the police coerced his confession. Notwithstanding the emergence of his detailed recollection, it appears that Perry's allegations about being coerced have only arisen after his conviction and sentence. When given opportunities to explain the circumstances surrounding his confession to his attorneys, the trial court, and the jury, Perry never claimed that police misconduct forced him to confess.

Perry's petition ignores the fact that he was in an automobile accident immediately before his arrest. In his confession, Perry admitted that he was "cut pretty badly" and that Burkett had to help him flee. Tr. Vol. 18 at 83-85. Perry makes no effort to show which injuries he received in the auto accident and which the police allegedly gave him. As no reasonable basis exists to suppose that Perry's confession was the result of coercion, trial counsel would have no basis to seek expert assistance to show that, because other individuals have erroneously confessed, Perry had done so also. The state habeas court, therefore, would not be unreasonable in finding that Perry manufactured his claim of coercion only after his conviction. As nothing substantiates his claims of coercion, trial counsel would not provide ineffective assistance in refusing to challenge his confession on that basis.

C. Prior Bad Conduct

Perry chose to testify at trial. Before testifying, Perry stated on the record that he chose to testify and

did so knowing that he would open himself up to cross-examination. Specifically, trial counsel warned Perry that he would be "subject to cross-examination plus impeachment . . . and that [his] reliability and credibility . . . [would be] subject to impeachment." Tr. Vol. 18 at 37-38. Trial counsel told Perry that "other acts of misconduct . . . will come into this particular case aiding the jury in determining your reliability and credibility. . . . [T]he State will impeach you with other wrongs, crimes, and acts of misconduct. . . . [O]nce you get started, we can't stop it." Tr. 18 at 38. Perry affirmed that he wanted to testify.

In his testimony, Perry disclaimed any involvement in the crime. Perry began his testimony by describing his background, paying particular attention to his history of schooling and participation in several youth programs without revealing why he was shuffled from program to program. Perry admitted to some past bad acts, such as drug and underage alcohol use. Tr. Vol. 18 at 62-64. For the most part, though, he provided a chronological recitation of his history without discussing previous bad conduct. Instead, Perry testified that his problems in school "[m]ainly all circulated around [his] concentration," meaning ADHD. Perry then went on to provide a self-serving version of the events surrounding the victim's death.

The prosecution vigorously cross-examined Perry. The prosecution emphasized previous bad acts committed by Perry. Both Perry and Respondent now give a detailed recitation of the bad acts mentioned by the

prosecution. (Docket Entry No. 4 at 23-26, 70-72; No.13 at 52-56). To summarize, the prosecution discussed how Perry attended several different schools and participated in programs for troubled youth because of his conduct made him unwelcome anywhere. The prosecution discussed many events that led to Perry switching schools and becoming involved with the juvenile justice system. The prosecution showed that Perry's misconduct, not ADHD or his family, was to blame for his unstable childhood. Also, the prosecution emphasized that Perry was "pretty well-established as a liar[.]" Tr. Vol. 18 at 115-16. In sum, the prosecution showed that, prior to this offense, Perry engaged in many acts of misconduct and participated in unadjudicated criminal acts. The prosecution also attacked the self-serving nature of Perry's testimony, showing that the other trial accounts and physical evidence did not corroborate his claim of innocence. The prosecution left the jury with the definite impression that Perry had a bad history and lied during trial. The defense did not object as the prosecution dismantled Perry's testimony. The prosecution did not mention the prior bad acts during closing argument.

Perry claims that trial counsel should have objected and prevented the State from bringing his prior bad acts before the jury. When Perry raised this claim on state habeas review, the state habeas court found that his "claim that trial court should have stopped the State's cross-examination of him is a record claim that is not cognizable on application for

a writ of habeas corpus." FFCL, p. 24 at ¶9.[32] In the alternative, the state habeas court found that the "State's questions were not objectionable" FFCL, p. 24 at 10.

Perry argues that "the district court did *not* find that these extraneous offenses were admissible." (Docket Entry No. 4 at 76). Perry, however fails to reconcile that statement with the habeas court's finding that the introduction of the bad acts was "not objectionable." This Court does not sit on habeas review to reinterpret a State's reading of its own law. *See Weeks v. Scott*, 55 F.3d 1059, 1063 (5th Cir. 1995).[33] Respondent goes through the record, point by point, and demonstrates how Perry's testimony opened the door to each bad act the prosecution adduced.[34] (Docket Entry No. 13 at 52-56); *see also*

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[32] Respondent argues that this holding constitutes a procedural bar of Perry's claim in federal court. Perry raises several objections to the procedural bar, including that Texas does not regularly prohibit an inmate from advancing ineffective-assistance claims for the first time on habeas review. While it appears that a procedural bar may prevent federal consideration, this Court finds his claim to be without merit.

[33] Perry does not raise a corresponding claim that the prosecution engaged in misconduct by mentioning the bad acts or that their introduction constituted an independent constitutional violation.

[34] On direct appeal, the Court of Criminal Appeals considered the related claim that "the trial court erroneously permitted the prosecution to cross-examine [Perry] at the guilt/innocence phase with specific instances of his unadjudicated misconduct for impeachment purposes." *Perry*, 158 S.W.3d at 442. The Court of Criminal Appeals dismissed this complaint

(Continued on following page)

State Habeas Record at 1850-59. Perry has not shown that trial counsel could have stopped the prosecution from discussing the bad acts.

Even if the questioning about bad acts was improper, and trial counsel should have made an objection, Perry's claim only merits habeas relief if he can show actual prejudice. His testimony, even without the blistering cross-examination of his character, did not significantly undermine the evidence against him. As noted by the state habeas court, the other evidence against Perry was "overwhelming." The jury's knowledge of his prior bad acts did not materially impact their consideration of the strong evidence against Perry.

Even had trial counsel objected and the trial court prevented the prosecution from impeaching Perry's character on those grounds, the prosecution's cross-examination otherwise gave the jury little reason to believe Perry's trial testimony.[35] Even without the discussion of the bad acts, the jury would note that the evidence did not corroborate, but in fact directly contradicted, Perry's version of the crime. No probability of a different result would have occurred

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because Perry "did not object to this cross-examination." *Perry*, 158 S.W.3d at 442.

[35] The state habeas court also found that the trial court and trial counsel "thoroughly advised [him] about the extraneous offenses and bad acts that the State intended to show against him, and about the State's right to cross-examine [Perry] to test his credibility as any other witness." FFCL, p. 18 at ¶¶145-46.

had trial counsel made the suggested objections.[36] The state court's rejection of this *Strickland* claim was not contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

D. Seek a Continuance

Because defense attorney Mr. Cantrell's parents both died within weeks before trial, the trial court offered to continue the case. Trial counsel declined. Perry alleges that "[p]eople mourning the loss of a loved one often experience reduced work performance due to a lack of concentration and tiredness from sleepless nights and depression." Perry claims that Mr. Cantrell seemed disinterested and actually slept at trial because of his grief. (Docket Entry No. 4 at 80). Perry argues that the failure to request a continuance amounts to a federal constitutional violation.

In his state habeas affidavit, Mr. Cantrell affirmed that "[t]he defense was ready for trial." Although both his parents died shortly before trial, he "welcomed the start of [Perry's] trial in that it prevented further reflection concerning the deaths of [his] elderly parents." Contrary to Perry's allegations, Mr. Cantrell "was not disinterested nor did [he] doze

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[36] Insofar as the influence of the "bad acts" testimony would have extended to the penalty phase, such information traditionally comes before a jury in the broad inquiry afforded capital sentencing.

or sleep at any time during [the] lengthy trial." State Habeas Record at 1754. Mr. Taylor confirmed that Mr. Cantrell "never expressed that he could not proceed with trial due to being distracted by grief over the loss of his parents." Mr. Taylor verified that Mr. Cantrell did not sleep, doze, or appear disinterested at trial. Additionally, the trial prosecutor affirmed:

> In my opinion, Mr. Cantrell was a strong advocate for Mr. Perry
>
> > throughout the trial despite the fact that Mr. Cantrell suffered the loss of his mother and father during the trial. Given the circumstances, Mr. Cantrell was amazingly resilient in his ability to set aside his personal difficulties and proceed with the trial. At no time did I ever observe Mr. Cantrell to be dozing or sleeping through any part of the trial. The only time I saw Mr. Cantrell close his eyes was when Mr. Perry decided to testify against his advice, and then he was also rubbing his head as though he had developed a very bad headache.

State Habeas Record at 1839.

The state habeas court found Mr. Cantrell credible when he said that he welcomed the start of trial. FFCL, p. 18 at ¶149. Based on personal recollection as well as affidavits from trial counsel and other trial participants, the state habeas court found that "Mr. Cantrell did not appear disinterested, or doze or sleep at any time during [Perry's] trial."

FFCL, p. 18 at ¶150. Even if Mr. Cantrell experienced some diminution in his effectiveness due to personal loss, the state habeas court found that Perry "does not assert that co-counsel Stephen Taylor slept or was absent during the guilt-innocence phase of his trial" and that he was "an active advocate for [Perry]." FFCL, p. 19 at ¶152.

This is not a case where Perry alleges that a continuance was necessary to develop evidence, contact witnesses, or otherwise strengthen the defense case. Perry does not allege that counsel needed more time to prepare a defense, but possibly to improve mentally and emotionally for trial. However, Perry has not shown that his parents' death caused Mr. Cantrell's performance as a trial attorney to slip below constitutionally established norms. Perry has not shown that Mr. Cantrell was not ready for trial or was otherwise impaired in his ability to represent Perry. This claim is without merit.

E. Mitigating Evidence

Perry claims that trial counsel did not do enough to prepare mitigating evidence for the punishment phase of trial. Perry downplays what trial counsel did to prepare a punishment-phase defense. Perry inaccurately claims that trial counsel "failed to make even a minimal investigation into potentially mitigating factors." (Docket Entry No. 4 at 83). Even a cursory review of the punishment phase shows that trial counsel prepared and presented mitigating evidence,

calling both lay and expert witnesses in an effort to secure a favorable answer to both special issues. This is simply not a case where trial counsel completely abdicated the duty to present a case against a death sentence. The question before the Court is whether trial counsel did enough.

Perry complains that trial counsel did not show the jury why he was predisposed to mental illness and drug usage, making him less culpable than other offenders. To that end, Perry claims that trial counsel did not present evidence of an emerging mental illness ("bipolar disorder, with pediatric onset"), the nexus between Perry's ADHD and his criminal actions, and inherited biological predispositions toward mental illness and substance abuse. Perry also claims that trial counsel inadequately questioned his ability to form the necessary *mens rea* for capital murder.

1. Mental health and substance abuse

The trial testimony showed that Perry had never previously been diagnosed with bipolar disorder. Perry claims that trial counsel should have hired a mental-health expert to perform an examination, the results of which would have shown him to suffer bipolar disorder. Perry bases his claim on an examination that Susan Stone, a psychiatrist, performed in 2005. She noted that "[s]ince his incarceration at TDCJ, he has been diagnosed with bipolar I disorder[.]" Dr.

Stone opined that Perry "*suffers* from bipolar disorder, with pediatric onset." Dr. Stone stated that this disorder existed concurrent to his ADHD. Dr. Stone opined that the diagnosis of ADHD, while not incorrect, possibly masked the bipolar disorder and explained why his behavior did not improve when his ADHD was treated. Dr. Stone identified a possible genetic basis for his bipolar disorder, pointing to his biological family's history of mental illness and child abuse. Dr. Stone stated that

> if [Perry's] treatment providers had knowledge of his extremely strong family history of mood disorders, his treatment would have been altered dramatically. I believe that the combination of this family history with the symptoms he was exhibiting would certainly have led to an early diagnosis of bipolar disorder. Treatment of his bipolar disorder with appropriate mood stabilizing medication, such as the mood stabilizers he is currently taking, would have assisted him with impulse control, decreased his problematic behaviors and would also likely have reduced his substance abuse problems.

(Docket Entry No. 4, Exhibit 45).

Perry faults trial counsel for not hiring a mental health expert who would have diagnosed him with bipolar disorder. Perry acknowledges that trial counsel sought Dr. Kessner's services, but faults trial counsel's failure to ask her how his ADHD and other disorders impacted his substance abuse, delinquency,

and criminal actions. Perry also provides an affidavit from another psychologist, Dr. Mark Cunningham, explaining how trial counsel could have better developed a mental-health mitigation defense. (Docket Entry No. 4 at 31). Further, Perry claims that trial counsel failed to have Dr. Kessner explain how the impulsivity associated with ADHD played into the murder. Perry claims that, had trial counsel presented the information above, the jury would have better understood the source of his behavioral problems and how those issues were not sufficiently addressed in his youth.

Perry also links his mental-health claim with an allegation that trial counsel insufficiently investigated his biological family background. Perry claims that investigation would have revealed a family saturated with mental illness and substance abuse.[37] Perry relies on research to link family history of substance abuse and mental illness to individual crime. Perry claims that the outcome of trial would have been different had trial counsel presented this information.

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[37] Perry, however, only supports this allegation with hearsay. Perry relies on a report by a "mitigation specialist" to give details about his family's history of mental illness. (Docket Entry No. 7, Exhibit 33). The details, however, come from the investigator's recitation of hearsay statements, not authenticated firsthand accounts. Perry has made no effort to provide reliable or admissible testimony about his family's background.

Defense counsels' affidavits claim that they made a reasonable investigation into Perry's mental and family background given the information available to them. Trial counsel noted that Perry "was never diagnosed by any medical professional, drug recognition expert, psychologist, or educator as having a severe drug addiction to any legal or illegal substance."[38] Perry himself "never described his drug usage . . . as being 'serious' or something he had no control over." Trial counsel investigated Perry's adoption records, had them unsealed, investigated his biological background, and presented his mother's history of substance abuse to the jury. Trial counsel objected to Perry's claim that he ignored the mental-health evidence, noting that "Dr. Gilda Kessner testified and was cross-examined regarding the connection between ADHD and other problems – namely drug usage, antisocial personality disorder, etc." Contrary to his allegations, trial counsel affirmed that Dr. Kessner "testified that impulsivity was a characteristic of ADHD." Trial counsel was also "not aware of any pre-trial diagnosis of [Perry showing] that [he] suffered from Bipolar Disorder." State Habeas Record at 1755; *see also* State Habeas Record at 1762.

The state habeas court issued explicit and detailed factual findings rejecting this claim. The state habeas court credited trial counsel's efforts to secure

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[38] When he was arrested, Perry told the prison officials that he was not addicted to drugs or alcohol. Tr. Vol. 25 at 53.

mitigating evidence from Dr. Kessner. FFCL, p. 19 at 11156. The state habeas court listed Dr. Kessner's efforts to develop a "mitigation package" that examined Perry's history for mental illness and substance abuse and her resultant testimony: (1) she interviewed Perry for seven to eight hours over a two-day period; (2) she spoke at length with his legal parents, his biological mother, his biological grandfather, and his biological brother; (3) she reviewed relevant records and literature; (4) she explained the relationship between ADHD and Perry's conduct disorder; (5) she testified how Perry's interrupted psychiatric therapy impacted him; (6) she testified that Perry had been exposed to sexual abuse; (7) she stated that Perry made a poor decision to leave the Casa by the Sea program; (8) she explained how Perry was immature; (9) she explained the genetic and neurological basis for ADHD; (10) she linked the murder to Perry's "immaturity of judgment, poor decision making and [his] impulsivity"; (11) she explained Perry lessened risk of future danger in prison; and (12) she explained how his risk would diminish after ten years of incarceration. FFCL, p. 20 at ¶160.[39] The state habeas court also recognized that trial counsel called several family members to testify in the punishment phase, including those he discovered by having Perry's adoption records unsealed. FFCL, pp. 20-21 at ¶¶158,

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[39] Dr. Kessner provided the defense with a report in which she detailed her investigation and its results. (Docket Entry No. 4, Exhibit 44).

163. On that basis, the state habeas found Perry's claim that trial counsel did not make "even a minimal investigation" to be "unfounded." FFCL, p. 21 at ¶159.

The state habeas court also questioned the strength of the potential mitigating evidence. The state habeas court noted that no medical records evaluated Perry's brain function for impairment from substance abuse and, while some studies investigates that relationship, Perry did not show "how the studies he cites . . . relate to him in terms of years of alcohol abuse, the amounts of alcohol ingested, age, or other factors." FFCL, p. 21 at ¶161. The state habeas court credited trial counsel's statement that Perry never said he had a serious or uncontrollable substance abuse problem and that the record did not reveal one. FFCL, p. 21 at ¶ 162. The state habeas court found that trial counsel indeed presented testimony about Perry's behavioral problems, his mental-health issues, and his biological family's alcohol and drug use. FFCL, p. 21 at ¶¶164, 166. Dr. Kessner testified that mental illness and substance abuse had a genetic component, and specifically did in Perry's case, but admitted that a large number of people suffering from those disorders did not commit violent acts FFCL, p. 21 at ¶167. The state habeas court also credited her testimony for discussing mental illness and conduct disorder, blaming ADHD for many of Perry's problems FFCL, p. 22 at ¶¶168-70.

The state habeas court seemed skeptical of the claim that trial counsel should have uncovered evidence that Perry suffered from bipolar disorder. The state habeas court noted that no testing revealed bipolar disorder before trial, and that the diagnosis only arose eighteen months after trial. FFCL, p. 22 at ¶¶171-75. Even then, Perry did not exhibit the suicidal tendencies characterizing bipolar disorder. The state habeas court observed that, even if Perry had that disorder when younger, none of literature cited by Perry linked that illness to a propensity to commit crime. FFCL, p. 22 at ¶¶175-76. On that basis, the state habeas court held that Perry's "claim that trial counsel should have presented evidence of his bipolar disorder is based upon a diagnosis by psychiatrists at TDCJ-ID 18 months after trial and unsettled theories of mental illness, and no deficient performance of trial counsel is shown." FFCL, p. 25 at T12.

Nothing before trial alerted trial counsel that Perry suffered from bipolar disorder. Trial counsel secured the assistance of a mental-health expert. That expert reviewed Perry's background, prior testing, and history. Trial counsel went to great lengths to identify and locate Perry's biological family. Trial counsel and Dr. Kessner interviewed biological relatives. All pre-trial investigation specifically excluded bipolar disorder from Perry's psychological history. While not to the same depth as the information presented on federal review, the punishment phase defense blamed Perry's psychological disorders and

substance abuse on his biological family especially during cross-examination. Without the full veneer of Perry's new argument, trial counsel still attributed the crime to impulsivity associated with mental illness. Perry has not shown what should have led trial counsel to seek a specific diagnosis of bipolar disorder, especially given the absence of that disorder in the record.

Even if trial counsel could have done more, Perry has not shown actual prejudice. The jury had before it information, though superficially, explaining the murder in the same way as that he propounds on federal review. The jury had to weigh that against Dr. Quijano's testimony that impulsivity played no part in the murder. More important, though, the jury would have to weigh the new information against Perry's deliberate planning of three murders and his constant violent behavior. The new information is not of the quality or quantity that would make the state habeas court's denial of relief unreasonable. Perry has not met the *Strickland* or AEDPA standard with respect to this claim.

2. *Mens rea*

Perry also complains that trial counsel did not form a guilt/innocence defense of diminished capacity due to substance abuse and mental illness.[40] Perry

[40] Perry has not shown drug or alcohol intoxication alone grossly impaired his judgment when killing the victim, and

(Continued on following page)

claims that trial counsel should have recognized that those factors lessened his ability to appreciate the results of his conduct, making the murder not an intentional one.

Trial counsel refuted the allegation that Perry's alleged diminished capacity could have been an effective defensive strategy. Trial counsel stated that Perry "never provided any names of witnesses that could attest to [his] state of sobriety at the time of the capital murder or to any 'co-morbid psychological disorders present in [him]' at the time of the capital murder." State Habeas Record at 1755. Perry simply "provided no information regarding his 'diminished capacity' to commit the crime." State Habeas Record at 1762. The state habeas court found that trial counsel made a reasonable investigation into the facts and "found no evidence that [Perry] did not possess the requisite mens rea to commit the offense." FFCL, p. 19 at ¶154. The state habeas court specifically found that Perry's confession amply showed that he did not have a diminished capacity at the time of the murder. FFCL, p. 19 at ¶155.

Texas prohibits that from being a basis to avoid conviction. *See* TEX. PENAL CODE § 8.04(a); *Mendenhall v. State*, 77 S.W.3d 815, 81[illegible] (Tex. Crim. App. 2002) (finding that only "persons who were unconscious or semi-conscious at the time of the alleged offense may argue either that they lacked the *mens rea* necessary for criminal liability . . . or that they did not engage in a voluntary act")

Perry relies on expert evaluations and scientific studies to allege a link between his mental problems and his violent behavior. Nonetheless, he has not shown that trial counsel should have argued that he lacked the mental capacity to commit capital murder. Even if the building blocks for such a theory existed, relying on a diminished capacity defense could be dangerous to the defense for several reasons. First, in asserting diminished capacity Perry would call into question his mental state at the time of the murder, likely requiring him to admit that he committed the crime. *See Williams v. Smith,* 888 F.2d 28, 30 (5th Cir. 1989); *Martin v. Maggio,* 711 F.3d 1273, 1278 (5th Cir. 1983); *cf* TEX. PENAL CODE § 8.01 ("It is an affirmative defense to prosecution that, *at the time of the conduct charged,* the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong."). Second, raising a diminished capacity defense in the guilt/innocence phase would require Perry to introduce evidence of mental illnesses such as bipolar disorder. While that evidence may show that "Perry has a history of mental illness and drug abuse, which most likely have had an impact on his actions and behaviors," (Docket Entry No. 4 at 108), it would do so at the expense of putting before the jury more testimony about his extraneous bad behavior. Exploration of that issue in the guilt/innocence phase could bring before the jury much negative information about Perry's past violent behavior that would predispose the jury toward guilt. Third, even at this stage the evidence Perry presents pales in comparison to the cases he cites involving "adult minimal

brain dysfunction" and its "total transformation of the personality." *Hendershott v. People,* 653 P.2d 385, 390 n.2 (Colo. 1982).[41] Finally, Perry makes broad allegations about the effect long term drug use had on his brain, but has done little to substantiate those allegations or individualize that information to his own psychological profile. Perry has not shown that drug or alcohol abuse made him less culpable, either temporarily or throughout his whole life. Perry has not shown that trial counsel was ineffective for not crafting a diminished capacity defense, much less that actual prejudice flowed from that decision.

F. Cumulative Error

Finally, Perry claims that trial counsel's alleged errors can be cumulated into a constitutional violation. Perry has not shown that trial counsel erred, much less that the cumulative effect of his representation violates the Constitution. *See Mullen v. Blackburn,* 808 F.2d 1143, 1147 (5th Cir.1987) ("Twenty times zero equals zero."). The Court finds that the Court of Criminal Appeals was not unreasonable in denying all Perry's ineffective-assistance-of-counsel claims. *See* 28 U.S.C. § 2254(d)(1).

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[41] Perry's evidence falls far short of legal insanity. *See* TEX. PENAL CODE § 8.01.

II. *Brady* Claims

Perry's petition raises a most serious allegation, that the prosecution suppressed information essential to the presentation of a meaningful defense. "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *see also Little v. Johnson*, 162 F.3d 855, 861-62 (5th Cir. 1998). The *Brady* rule underscores the "special role played by the American prosecutor in the search for truth in criminal trials." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). "Courts, litigants, and juries properly anticipate that 'obligations [to refrain from improper methods to secure a conviction] . . . plainly resting] upon the prosecuting attorney, will be faithfully observed." *Banks v. Dretke*, 540 U.S. 668, 697 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). Three essential elements compose a valid *Brady* claim: "'The evidence must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.'" *Banks*, 540 U.S. at 691 (quoting *Strickler*, 527 U.S. at 281-282).[42]

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[42] Cases often add a fourth requirement: "nondiscovery of the allegedly favorable evidence was not the result of a lack of due diligence." *United States v. Walters*, 351 F.3d 159, 169 (5th

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Perry lists five categories of information that the prosecution allegedly suppressed from his attorneys:

> (1) The prosecution did not inform Perry that the [sic] Victor Neal received full immunity for his trial testimony.
>
> (2) The prosecution did not turn over to the defense a second typewritten statement that Mr. Neal gave to the police.
>
> (3) The prosecution did not inform the defense that several inmates heard Burkett confess that he, not Perry, did not [sic] kill the victim.
>
> (4) The prosecution knew that unreliable witnesses confirmed the details of Perry's confession.
>
> (5) The prosecution did not inform the defense that police officers knew the location of James Adam Stotler and Jeremy Richardson's bodies before Perry led them there.[43]

Cir. 2003); *see also Graves v. Cockrell*, 351 F.3d 143,153-54 (5th Cir. 2003). "When evidence is equally available to both the defense and the prosecution, the defendant must bear the responsibility for failing to conduct a diligent investigation." *Kutzner v. Cockrell*, 303 F.3d 333, 336 (5th Cir. 2002). For that reason, portions of Perry's *Brady* claim are incompatible with his allegations that counsel rendered ineffective assistance by not securing the same information.

[43] While Perry does not list it as a ground for relief, Perry's briefing also accuses the prosecution of suppressing Kristin Willis' blood-stained shirt that was found in the victim's Isuzu.

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The state habeas court issued extensive and detailed factual findings on Perry's *Brady* claims. This Court must presume those findings correct unless Perry shows otherwise by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1).

Perry bases much of his *Brady* argument on speculation. "An applicant's speculation about the suppression of exculpatory evidence is an insufficient basis to support a *Brady* claim." *Medellin v. Dretke*, 371 F.3d 270, 281 (5th Cir. 2004); *see also Wood v. Bartholomew*, 516 U.S. 1, 6 (1995) (denying *a Brady* claim based on "mere speculation"); *Hughes v. Johnson*, 191 F.3d 607, 630 (5th Cir. 1999) ("[S]peculation does not support a *Brady* claim."). For instance, Perry theorizes that police officers knew where Adam Stotler and his friend were killed before Perry led them there. No affidavit, testimony, or evidence supports this theory. The state habeas court found "no evidence showing that law enforcement officers knew the location of the bodies of Adam Stotler or Jeremy Richardson prior to his confession." FFCL, p. 19 at ¶111. Perry cannot point to anywhere in the record that concretely shows that the police knew of, but ignored, two murders until after his arrest. Perry does not disturb the state habeas court's finding that

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The state habeas court issued factual findings which show that this is not a viable ground for relief. FFCL, p. 16 at ¶¶118-23. Importantly, the prosecution affirmed that defense had access to the shirt. If Perry intended to base a claim on the suppression of the shirt, he is not entitled to habeas relief on that ground.

the police "first learned that Adam Stotler and Jeremy Richardson were dead when [Perry] described their shootings shortly after his arrest." FFCL, p. 15 at ¶112.

Perry's *Brady* claim also lacks specificity. Perry speculates that the prosecution wove a web of deceit by calling witnesses who lied about his guilt. Perry makes the bald assertion that "[t]he circumstantial case that appeared to corroborate Perry's 'confession' was supported by testimony of witnesses the prosecution knew to be unreliable, intimidated, and otherwise impeachable." (Docket Entry No, 4 at 49). Perry does not identify which witnesses' testimony was not credible, much less how the prosecution suppressed that fact from the defense. Despite his construction of the evidence in manner which he alleges shows his innocence (but ignores highly inculpatory information), Perry has not shown that the prosecution knew he was innocent when prosecuting him for capital murder.

Perry's *Brady* claim relies on allegations that he has not substantiated. Perry asserts that the prosecution did not divulge that Victor Neal received immunity from prosecution in return for his trial testimony. Also, Perry alleges that the prosecutor did not turn over a second typewritten statement prepared by Mr. Neal. The state habeas court extensively reviewed the trial testimony from this case and from Burkett's trial, focusing on Mr. Neal's participation. The state habeas court found credible affidavits showing that the prosecution did not enter into an

immunity agreement with Mr. Neal. FFCL, p. 9-10 at ¶¶76-84. The state court found, in essence, the prosecution made no promise of immunity because Mr. Neal committed no crime. Perry has not rebutted the presumptively correct finding that "Neal did not provide a second typewritten statement[.]" FFCL, p. 14 at ¶99. Perry has not shown that the state court was wrong when it found that "[t]he State did not suppress evidence of an 'immunity agreement' with Victor Neal." FFCL, p. 10 at ¶84.

Additionally, Perry has not shown that any alleged suppression of evidence is attributable to the prosecution. For instance, Perry claims that Burkett confessed to inmates (Patrick Sedillo, Jason Middleton, and Jeremy Vogel) that he, not Perry, killed the victim. Nevertheless, Perry has not shown that those men "informed law enforcement of Jason Burkett's alleged statements[.]" FFCL, p. 14 at 11103. Perry has not shown any precedent making the prosecution responsible for divulging conversations between inmates of which the State has no knowledge.[44]

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[44] For the first time on federal habeas review, Perry presents an affidavit from an inmate, Michael Geisler, who allegedly heard Burkett confess to the victim's murder. Even if this Court can overlook the obvious procedural problems that arise because Perry did not present this affidavit in state court, Geisler's affidavit does not show that a constitutional violation occurred. Perry attributes knowledge of Burkett's statement to the State because (1) Geilser [sic] was a jail trustee and (2) other correction employees were in a location that may have allowed them also to overhear the statement. Perry, however, provides

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Finally, the state habeas court made several findings that impact the *Brady* materiality inquiry. For instance, the state habeas court found that "overwhelming" evidence inculpated him even absent Mr. Neal's testimony. FFCL, pp. 10-12 at ¶¶86-88.[45] Perry's *Brady* claims do not raise issues that would have brought about the possibility of a different result had the defense possessed the allegedly suppressed information. Perry has not shown by the appropriate legal standards that the state factfindings are not correct and he has not otherwise met his burden under the AEDPA. *See* 28 U.S.C. § 2254(d). This Court will deny Perry's *Brady* claim.

III. Texas' Mitigation Special Issue

Texas law explicitly requires the jury to consider whether sufficient circumstances militate against a sentence of death. Texas' mitigation special issue asks:

> Taking into taking into consideration all of the evidence, including the circumstances of

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no case law showing that a jail trustee is a state actor for *Brady* purposes. Also, Perry does not verify that any state actor overheard the conversations.

[45] The state habeas court also inferentially found that trial counsel's failure to uncover the inmates' testimony did not prejudice the defense. FFCL, p.24 at ¶7. A finding of no *Strickland* prejudice involves the same inquiry as *Brady* materiality. *See Johnson v. Scott*, 68 F.3d 106, 109-10 (5th Cir. 1995).

> the offense, the defendant's character and background, and the personal moral culpability of the defendant, is there a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

Trans. at 607. Perry claims that Texas' manner of putting mitigating evidence before the jury violates constitutional standards. Perry argues that the mitigation special issue is invalid because it (1) does not contain an explicit burden of proof; (2) uses vague terms; and (3) is not subject to meaningful appellate review. The Court of Criminal Appeals rejected each argument on direct appeal. The Court finds that the state court adjudication was not contrary to, or an unreasonable application of, federal law

A. Burden of Proof on Mitigating Special Issue

Perry complains that Texas does not assign a burden of proof to the mitigation special issue. Perry assumes that the prosecution should disprove the existence of mitigating circumstances beyond a reasonable doubt. Here, the trial court's instructions did not assign a specific burden to either party on the second special issue.

Under Texas law, "[n]o burden of proof exists for either the state or the defendant to disprove or prove the mitigating evidence. Thus, each juror individually and subjectively determines what evidence, if any, is sufficient to mitigate against the imposition of the

death penalty." *Woods v. Cockrell*, 307 F.3d 353, 359 (5th Cir. 2002) (citing *Colella v. State*, 915 S.W.2d 834, 844 (Tex. Crim. App. 1995)); *see also Prystash v. State*, 3 S.W.3d 522, 535 (Tex. Crim. App. 1999). However, the practical reality of trial anticipates that a capital defendant will present mitigating evidence, *implicitly* placing on the defense a burden to present mitigating evidence and to convince the jury of its significance. *See Lawton v. State*, 913 S.W.2d 542, 557 (Tex. Crim. App. 1995) ("[T]he burden is implicitly placed upon appellant to produce and persuade the jury that circumstances exist which mitigate against the imposition of death in his case.").

Perry's proposed assignation of a burden for the prosecution to disprove mitigating evidence "ignores the distinction the [Supreme] Court has often recognized between facts in aggravation of punishment and facts in mitigation." *Apprendi v. New Jersey*, 530 U.S. 466, 490 n.16 (2000) (citations omitted). Supreme Court authority anticipates that

> [s]o long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency.

Walton v. Arizona, 497 U.S. 639, 650 (1990).[46] Supreme Court precedent does not place a mitigation burden on the prosecution and does not contain "any hint of [such] a limiting principle." *Id.* at 688. The Fifth Circuit, in rejecting similar claims, has held

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[46] The Supreme Court in *Ring v. Arizona*, 536 U.S. 584, 598 (2002), reversed *Walton*'s holding that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." The Supreme Court, however, did not overrule *Walton*'s consideration of the burden of proof regarding mitigating evidence. *See Ring*, 536 U.S. at 609. Perry claims that *Ring*, which applied *Apprendi* to capital sentencing proceedings, requires the State to disprove the existence of mitigating factors beyond a reasonable doubt. *Apprendi* and its progeny require a jury to decide, beyond a reasonable doubt, any fact that increases a defendant's punishment. Before a Texas capital jury considers the mitigation special issue, the jury has already found an aggravating factor beyond a reasonable doubt in the eligibility portion of trial (and a second aggravating factor through the future dangerousness inquiry), thus authorizing a capital sentence. The maximum punishment available then is death. The factual issues involved in answering the mitigation special issue do not *increase* an inmate's *authorized* punishment; a 'no' answer to the mitigation issue merely actualizes the imposition of that punishment. Thus, the absence of mitigating evidence could not be "the functional equivalent of an element of capital murder which the state must prove beyond a reasonable doubt" as required by *Apprendi*. *United States v. Webster*, 392 F.3d 787, 792 (5th Cir. 2004); *see also In re Johnson*, 334 F.3d 403, 405 (5th Cir. 2003) (finding that the absence of mental retardation, akin to mitigating evidence, is not "the functional equivalent of an element of capital murder which the state must prove beyond a reasonable doubt"). The fact that the jury could answer the mitigation issue in a manner that lessens a capital defendant's sentence to life imprisonment hardly detracts from the statutory maximum that the jury could already allow before reaching that issue.

that "no Supreme Court or Fifth Circuit authority requires the State to prove the absence of mitigating circumstances beyond a reasonable doubt." *Rowell v. Dretke*, 398 F.3d 370, 378 (5th Cir. 2005); *see also Oliver v. Quarterman*, 2007 WL 4014629, at *3 (5th Cir. Nov. 16, 2007) (unpublished); *Ortiz v. Quarterman*, 504 F.3d 492, 505 (5th Cir. 2007); *Manns v. Quarterman*, 236 Fed. App'x 908, 911 (5th Cir. 2007) (unpublished); *Scheanette v. Quarterman*, 482 F.3d 815, 828 (5th Cir. 2007); *Granados v. Quarterman*, 455 F.3d 529, 536 (5th Cir. 2006); *Anderson v. Quarterman*, 204 Fed. App'x 402, 409 5th Cir. 2006); *Martinez v. Dretke*, 173 Fed. App'x 347, 354 (5th Cir. 2006) (unpublished); *Lewis v. Cockrell*, 58 Fed. App'x 596 (5th Cir. 2003) (unpublished); *McWilliams v. Cockrell*, 74 Fed. App'x 345, 349-50 (5th Cir. 2003) (unpublished). Simply, "a state death penalty statute may place the burden on the defendant to prove that mitigating circumstances outweigh aggravating circumstances." *Kansas v. Marsh*, ___ U.S. ___, 126 S. Ct. 2516, 2524 (2006).

Here, the State proved the elements of capital murder beyond a reasonable doubt in the guilt/innocence phase. Texas does not violate the Constitution by expecting the defense to present mitigating evidence in the punishment phase; the practical reality of trial assumes that a capital defendant will adduce mitigating evidence. In fact, any burden implicitly transferred to the defense by the second special issue is logically related to trial counsel's Sixth Amendment obligation to investigate and pre-

pare mitigating evidence. The second special issue's recognition of that fact does not violate the Constitution. Since no Supreme Court authority requires the State to prove the absence of mitigating circumstances beyond a reasonable doubt, this Court could not rule otherwise except by creating a new rule of constitutional law in violation of *Teague v. Lane*, 489 U.S. 288 (1989).

B. The Mitigating Special Issue is Imper missibly Narrow

Perry claims that the mitigation special issue is not broad enough to allow jury consideration of all a defendant's mitigating evidence. Texas requires the jury to decide whether "a sufficient mitigating circumstance or circumstances" warrant a life sentence. TEX. CODE CRIM. PROC. ANN. art. 37.071(2)(e)(1). Here, the jury instructions defined "mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness." Trans. at 601. Perry claims that the definition of mitigating evidence improperly limited the jury's deliberations. Perry argues that the jury should instead focus on all evidence that "militates for or against the imposition of the death penalty" as the instructions authorized under the first special issue. (Docket Entry No. 4 at 127). The Court of Criminal Appeals rejected this claim on direct appeal. *See Perry*, 158 S.W.3d at 449.

"Mitigating evidence that illustrates a defendant's character or personal history embodies a

constitutionally important role in the process of individualized sentencing, and in the ultimate determination of whether the death penalty is an appropriate punishment." *Riley v. Cockrell*, 339 F.3d 308, 316 (5th Cir. 2003) (citing *Moore v. Johnson*, 194 F.3d 586, 612 (5th Cir. 1999)). A State must "permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime." *Marsh*, ___ U.S. at ___, 126 S. Ct. at 2525. The Supreme Court, however, has never required the States to conform to only one method of considering mitigating evidence *See Franklin v. Lynaugh*, 487 U.S. 164, 179 (1988). "[T]he state may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence." *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998); *see also Franklin*, 487 U.S. at 179.

The Fifth Circuit has held that Texas' definition "encompasses 'virtually any mitigating evidence.'" *Roach v. Quarterman*, 220 Fed. App'x 270, 277 (5th Cir. 2007) (quoting *Beazley v. Johnson*, 242 F.3d 248, 260 (5th Cir. 2001)); *see also Jackson v. Dretke*, 181 Fed. App'x 400, 412 (5th Cir. 2006). The language from Texas' special issue echos [sic] language in *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) where the Supreme Court held that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and

any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." "Far from rejecting the current scheme regarding mitigation, . . . the Supreme Court implicitly endorsed it" in *Penry v. Johnson*, 532 U.S. 782 (2001). *Oliver*, 2007 WL 4014629 at *5. In *Penry,* when striking down Texas' former sentencing scheme the Supreme Court called the new statute "[a] clearly drafted catchall instruction on mitigating evidence" and a model of "brevity and clarity." *Penry*, 532 U.S. at 802.

Nothing in federal precedent indicates that Texas' current means of putting mitigating evidence before the jury violates the Constitution. The Court of Criminal Appeals' rejection of this claim was not contrary to, or an unreasonable application of, federal law. 28 U.S.C. § 2254(d)(1). This Court could only grant relief on this clam by making new constitutional law in violation of *Teague*.

C. Meaningful Appellate Review of the Mitigation Special Issue

Perry also contends that the Constitution requires a state appellate court to review an inmate's mitigating evidence, presumably in much the same way that it can consider the sufficiency of the evidence supporting an inmate's conviction uncle: *Jackson v. Virginia*, 443 U.S. 307 (1979). *Perry* argues that the Court of Criminal Appeals' refusal to reconsider and reweigh the mitigating evidence a capital

defendant presents at trial violates the Constitution's guarantee to meaningful appellate review.

"[M]eaningful appellate review" in capital cases "serves as a check against the random or arbitrary imposition of the death penalty." *Gregg v. Georgia*, 428 U.S. 153, 195, 206 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). While the Court has repeatedly emphasized that a State must meaningfully review death sentences on appeal, *see, e.g.*, *Parker v. Dugger*, 498 U.S. 308, 321 (1991); *Clemons v. Mississippi*, 494 U.S. 738, 749 (1990), no federal precedent anticipates that a capital defendant has a right to appellate *mitigation* review. Meaningful appellate review requires "an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Zant v. Stephens*, 462 U.S. 862, 879 (1983); *see also Parker*, 498 U.S. at 321. This appellate review, however, must give way to the Supreme Court's "much more explicit directives" that respect a jury's "narrowly cabined but unbridled discretion to consider any mitigating factors submitted by the defendants and weighed as the jury sees fit. . . ." *Moore v. Johnson*, 225 F.3d 495, 506-07 (5th Cir. 2000). The Court of Criminal Appeals allows the jury unbridled discretion in its evaluation of mitigating circumstances and refuses to review whether sufficient evidence supported the jury's answers to the mitigation special issue. *See, e.g.*, *McFarland v. State*, 928 S.W.2d 482, 498 (Tex. Crim. App. 1996) ("Because the weighing of 'mitigating evidence' is a subjective determination undertaken by

each individual juror, we decline to review that evidence for 'sufficiency.'"). By bestowing upon the jury the narrowly cabined, but unbridled, discretion to consider mitigating evidence, Texas has "followed Supreme Court instructions to the letter." *Moore*, 225 F.3d at 506. Accordingly, "[n]o court could find that Texas had acted contrary to federal law as explained by the Supreme Court, and no benefit will arise from further consideration of the obvious." *Id.*; *see also Woods*, 307 F.3d at 360.[47] On that basis, the Fifth Circuit has repeatedly rejected claims that the Constitution requires the Court of Criminal Appeals to reconsider the jury's evaluation of the mitigating evidence. *See Rowell*, 398 F.3d at 377; *Johnson v. Cockrell*, 306 F.3d 249, 256 (5th Cir. 2002); *Woods*, 307 F.3d at 359-60; *Beazley*, 242 F.3d at 261; *Moore*, 225 F.3d at 506-07; *Hughes*, 191 F.3d at 621-23.[48] Perry makes no attempt to distinguish the binding Fifth Circuit precedent that governs this claim. The state court's rejection of this claim withstands AEDPA review. *See* 28 U.S.C. § 2254(d)(1).

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[47] Perry also argues that a Texas statute, TEX. CRIM. PRO. art. 44.251, requires the Court of Criminal Appeals to perform an appellate mitigation review. "[T]he proper interpretation of state law is not cognizable in federal habeas proceedings." *Beazley*, 242 F.3d at 261 (refusing to consider whether TEX. CRIM. PRO. art. 44.251 implicated federal constitutional concerns).

[48] In addition, Perry's meaningful-appellate-review claim anticipates the creation of a new rule that would violate *Teague*'s non-retroactivity principle. *See Woods*, 307 F.3d at 360; *Beazley*, 242 F.3d at 263.

IV. False Testimony

Perry alleges that an expert witness for the prosecution provided false and misleading testimony. In the punishment phase, the State called Dr. Walter Quijano, a psychologist who frequently testifies in capital trials. Dr. Quijano never met or interviewed Perry before trial, but testified after reviewing clinical records from Perry's treatment, hospital records, records from Perry's earlier probation, and jail records. Dr. Quijano rejected the argument that ADHD accounted for Perry's actions. Instead, Dr. Quijano testified that two diagnosis [sic] in the record explained Perry's mental conditions: (1) oppositional defiant disorder – "a prolonged established factor of defiance to authority"; and (2) conduct disorder – "engag[ing] in illegal behavior again and again." Tr. Vol. 26 at 244-45. Dr. Quijano testified that these two conditions

> are precursor disorders to antisocial personality disorders. They are given to juveniles . . . in hope that they will outgrow it as they grow older. Individuals who are oppositional defiant and conduct disorders who do not outgrow this defiance, this rejection of social rules, who continue to violate the rights of others become antisocial personality disorder in adulthood.

Tr. Vol. 26 at 260. Dr. Quijano testified that factors such as age, gender, the deliberate nature of the crime, and a lack of remorse contribute to a finding of future dangerousness. While Dr. Quijano never

expressly testified that Perry would be a future danger, his comments about Perry's lack of remorse or conscious [sic] and testimony about anti-social personality disorder facilitated the jury's answer to that special issue. Tr. Vol. 26 at 264.

Perry claims that Dr. Quijano gave false testimony. Perry relies on testimony from Dr. Mark Cunningham, a psychologist, who explains that no study demonstrates that anti-social personality disorder is a predictor of future violence in prison. In fact, according to Dr. Cunningham, 75% of inmates suffer from that disorder, making it an unreliable indicator of how violent capital inmates will be. Also, Dr. Cunningham disputed the other factors Dr. Quijano relied on in making his prediction. Perry alleges that, even to the extent anti-social personality disorder is relevant to the future-dangerous inquiry, Dr. Quijano misapplied governing psychological standards in making his predication. On that basis, Perry concludes that Dr. Quijano's testimony was unreliable, irrelevant, and unfairly prejudicial in violation of his Eighth and Fourteenth Amendment rights to due process and heightened reliability in capital sentencing. Perry also accuses trial counsel of violating the Constitution by not adequately challenging Dr. Quijano's testimony.

As noted by Respondent, Perry's false-testimony claim is a hybrid argument. On one hand, the Fifth and Fourteenth Amendments prevent the prosecution from knowingly using false testimony. "[A] conviction

must be set aside where the petitioner has demonstrated that (1) the witness gave false testimony; (2) the falsity was material in that it would have affected the jury's verdict; and (3) the prosecution used the testimony knowing it was false." *Reed v. Quarterman*, 504 F.3d 465, 473 (5th Cir. 2007). On the other hand, Perry's claim invokes the Eighth Amendment's concern for "the qualitative difference of death from all other punishments" which thus "requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California v. Ramos*, 463 U.S. 992, 998-99 (1985). Perry seems to challenge any use of expert testimony to prove future dangerousness. This Court, therefore, must decide whether the Constitution allowed Dr. Quijano to testify and then whether his testimony was knowingly false.

Psychological opinions on future dangerousness have long informed the capital sentencing process. The Supreme Court has observed that

> The suggestion that no psychiatrist's testimony may be presented with respect to a defendant's future dangerousness is somewhat like asking us to disinvent the wheel. In the first place, it is contrary to our cases. If the likelihood of a defendant committing further crimes is a constitutionally acceptable criterion for imposing the death penalty, which it is, *Jurek v. Texas*, 428 U.S. 262, 96 S. Ct. 2950, 49 L. Ed.2d 929 (1976), and if it is not impossible for even a lay person sensibly to arrive at that conclusion, it

> makes little sense, if any, to submit that psychiatrists, out of the entire universe of persons who might have an opinion on the issue, would know so little about the subject that they should not be permitted to testify.

Barefoot, 463 U.S. at 896-97; *see also Estelle v. Smith*, 451 U.S. 454, 473 (1981) (stating that the Supreme Court was in "no sense disapproving the use of psychiatric testimony bearing on future dangerousness"). The Supreme Court cautioned that

> [p]sychiatric testimony predicting dangerousness may be countered not only as erroneous in a particular case but as generally so unreliable that it should be ignored. If the jury may make up its mind about future dangerousness unaided by psychiatric testimony, jurors should not be barred from hearing the views of the State's psychiatrists along with opposing views of the defendant's doctors.

Barefoot, 463 U.S. at 898-99. Perry, however, has not shown any Supreme Court case that outlaws all death sentences based on psychological testimony.

Perry challenges Dr. Quijano's testimony as specifically unreliable. Dr. Quijano had previously been chief psychologist and director of psychiatric services for Texas Department of Criminal Justice – Institutional Division. Tr. Vol. 26 at 238. Dr. Quijano had testified in around 150 capital trials. Tr. Vol. 26 at 240. After reviewing Dr. Quijano's experience, the state habeas court found that Dr. Quijano "is well

qualified to testify as a psychiatric expert in a death penalty case." FFCL, p. 23 at ¶178. The state habeas court also found that Dr. Quijano based his testimony on Perry's "treatment, clinical, hospital, and jail records, and [his] conduct." FFCL, p. 23 at ¶179. The court concluded that "Dr. Quijano's testimony about the factors he considers in determining whether a person poses a continuing danger is not undercut by the absence of peer review of empirical studies." FFCL, p. 25 at ¶14. Because "'[e]ually [sic] qualified experts may rationally reach contrary opinions based on the same data' . . . and . . . Dr. Mark Cunningham[ ] is entitled to have a different opinion than Dr. Quijano," the State's expert testimony did not violate the Constitution. FFCL, p. 25 at ¶¶16-18.

The state habeas court correctly found no evidentiary error or constitutional violation with respect to Dr. Quijano's testimony. Perry has not shown that Dr. Quijano's testimony was false, much less that the prosecution knew of its falsity. At best, he shows that reasonable experts may disagree about how a jury should answer the first special issue, both in general and under the discrete facts in this case. Whatever issue Perry may take with Dr. Quijano's testimony, his trial was the venue to voice his concerns. Perry could have challenged the basis for Dr. Quijano's testimony before he came in front of the jury. Perry could have vigorously disputed Dr. Quijano's methodology and conclusions. Perry could have recalled his experts to rebut Dr. Quijano's testimony. Instead, Perry's cross-examination was

brief and centered on factors unrelated to the issue before this Court.

Perry alleges that trial counsel's representation violated the Constitution in that regard. Perry contends that "counsel provided inadequate assistance by their failure to assert a *Daubert/Nenno/Kelly* challenge to Dr. Quijano's testimony." (Docket Entry No. 4 at 109).[49] As discussed above, the Constitution does not prohibit expert testimony on future dangerousness and Perry has not shown anything more than that experts may disagree with Dr. Quijano on what may aid the jury in answering the first special issue. Perry has not shown that the trial court should have excluded Dr. Quijano's testimony.

Further, trial counsel made a strategic decision not to exclude Dr. Quijano. Trial counsel's state habeas affidavit indicates that the defense attorneys considered it more beneficial to attack Dr. Quijano's testimony because he never interviewed Perry, had never done independent research on future dangerousness, spent little time reviewing empirical studies on future dangerousness, and was untruthful about his background. State Habeas Record at 1756. Dr. Quijano's testimony was particularly vulnerable be-

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[49] Perry refers to *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993); *Nenno v. State*, 970 S.W.2d 549 (Tex. Crim. App. 1999); and *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992). These cases deal with the reliability of expert testimony, with *Nenno* specifically addressing the use of expert testimony on future dangerousness.

cause he previously used race as a consideration in testifying that a defendant was deathworthy, a factor that invalidated many death sentences. Perry has not shown that trial counsel's hope that the State would weaken its own case by calling Dr. Quijano is not entitled to the deference given tactical decisions. Trial counsel's failure to act affirmatively to foreclose his testimony, therefore, does not give rise to a valid ineffective-assistance-of-counsel claim.

Perry has not shown that expert psychological testimony in general or Dr. Quijano's testimony in this case violates the Constitution. The state court's decision was, therefore, not contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

V. Prohibition on the Execution of Juveniles

When Perry killed the victim, he was over 19 years old. The Supreme Court in *Roper v. Simmons*, 543 U.S. 551(2005), held that the Eighth Amendment prohibits the execution of offenders who were minors when they killed. Perry seeks to extend *Roper* to prohibit his execution, both by arguing that all 19-year-olds are exempt from execution and by showing that his mental status at the time of the murder was more similar to that of a juvenile than an adult.

The state habeas court found that Perry "is not a juvenile under the age of 18 and is not exempt from the death penalty." FFCL, p. 25 at ¶19. No federal case has extended *Roper* to anyone older than age 18

or who shares mental characteristics with those under 18. In *Roper,* the Supreme Court explained that

> the qualities that distinguish juveniles from adults do not disappear when an individual turns 18. . . . [H]owever, a line must be drawn. . . . The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

543 U.S. at 574; *see also Parr v. Quarterman*, 472 F.3d 245, 261 (5th Cir. 2006) (allowing an execution to proceed when the murder occurred four days after the defendant's eighteenth birthday). Perry has shown no nationwide emerging accord that the execution of those reaching the age of majority violates contemporary and evolving standards of decency. Perry cannot show that the state court's adjudication of this claim was contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

VI. Cumulative Error

Perry claims that the aggregate of all his allegations means that cumulative error infected his trial. The state habeas court properly found that "[n]on-error may not in 'their cumulative effect cause error.'" FFCL, p. 25 at ¶20 (quoting *Chamberlain v. State*, 998 S.W.2d 230, 238 (Tex. Crim. App. 1999)). "Federal habeas relief is only available for cumulative errors that are of a constitutional dimension." *Coble v. Quarterman*, 496 F.3d 430, 440 (5th Cir. 2007). As

Perry has not shown any constitutional error, his cumulative error argument fails.

CERTIFICATE OF APPEALABILITY

The AEDPA prevents appellate review of a habeas petition unless the district or circuit courts certify specific issues for appeal. *See* 28 U.S.C. § 2253(c); FED. R. APP. PRO. Rule 22(b). Perry has not yet requested that this Court grant him Certificate of Appealability ("COA"), though this Court can consider the issue *sua sponte*. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000). A court may only issue a COA when "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Clear, binding precedent forecloses relief on Perry's claims. Under the appropriate standard, Perry has not shown that this Court should certify any issue for appellate consideration. This Court will not certify any issue for review by the Fifth Circuit.

CONCLUSION

For the reasons described above, the Court finds that Perry has not shown entitlement to federal habeas relief. This Court **GRANTS** Respondent's motion for summary judgment, **DENIES** Perry's petition and motion for discovery, and **DISMISSES** this case **WITH PREJUDICE**. No Certificate of Appealability will issue in this case.

The Clerk will provide a copy to the parties.

SIGNED at Houston, Texas, on this the 22 day of Feb., 2008.

/s/ David Hittner
DAVID HITTNER
United States District Judge

No. 02-01-00320-CR-(1)

EX PARTE	§	IN THE DISTRICT
	§	COURT OF
MICHAEL JAMES PERRY	§	MONTGOMERY
	§	COUNTY, TEXAS
	§	221ST JUDICIAL DISTRICT

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

(Filed Aug. 18, 2005)

Having considered the application for writ of habeas corpus, along with State's answer in opposition to Applicant's application, and the Court's file in the above-numbered cause, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On December 29, 2004, Applicant filed his first application for writ of habeas corpus pursuant to Article 11.071 of the Code of Criminal Procedure asserting 19 grounds for relief:

   a. Michael is actually innocent of capital murder and was thus improperly convicted (in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution." [App. at 15]

   b. "The prosecution denied Michael his right to a fair trial by concealing evidence favorable to him at guilt-innocence and

punishment (in violation of Brady and its progeny)." [App. at 23]

c. "Trial counsel were ineffective for failing to investigate, discover, present and argue the facts demonstrating his innocence of the crime (in violation of the Sixth and Fourteenth Amendments to the United States Constitution)." [App. at 32]

d. "Trial counsel were ineffective for failing to investigate, discover, and present the facts demonstrating that Michael's 'confession' was not voluntary (in violation of the Sixth and Fourteenth Amendments to the United States Constitution)." [App. at 36]

e. "The arresting officers were reckless and/or negligent in that they failed to take proper account of Michael's physical condition and mental health deficits when they obtained his 'confession' (in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution)." [App. at 36]

f. "Michael was denied his Fifth Amendment right against compelled testimony and his Fourteenth Amendment right to due process." [App. at 36]

g. "Trial counsel were ineffective at the guilt-innocence phase for their failure to prevent the prosecutors from presenting unduly prejudicial evidence of extraneous misconduct and for their failure to preserve error regarding such evidence (in violation of the

Sixth and Fourteenth Amendments to the United States Constitution)." [App. at 40]

h. "After both his parents passed away just weeks before the commencement of the trial, lead trial counsel was ineffective for his failure to (1) accept an offer to continue the case, or (2) request a continuance to preserve Michael's right to have a lawyer not distracted by grief (in violation of the Sixth and Fourteenth Amendments to the United States Constitution)." [App. at 48]

i. "Trial counsel were ineffective and inadequate because they failed to investigate, develop, and present evidence that could have defeated *mens rea* (in violation of the Sixth and Fourteenth Amendments)." [App. at 49]

j. "Trial counsel were ineffective and inadequate because they failed to investigate, develop, and present crucial mitigation evidence (in violation of the Eighth and Fourteenth Amendments to the United States Constitution)." [App. at 53]

k. "Although the question whether Michael actually shot M. Stotler was raised by the Kristin Willis testimony, trial and appellate counsel failed to secure his right to individualized sentencing proceeding (in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution)." [App. at 65]

l. "Trial counsel failed to properly or adequately challenge the testimony of Dr. Walter Quijano (in violation of the Sixth and Fourteenth Amendments to the United States Constitution)." [App. at 67]

m. "Dr. Walter Quijano's testimony was inadmissible under Daubert/Nenno/Kelly and violated Michael's rights to heightened reliability in sentencing and due process (in violation of the Eighth and Fourteenth Amendments to the United States Constitution)." [App. at 67]

n. "Michael was denied his due process rights under the Fourteenth Amendments [sic] due to the false and misleading testimony of Dr. Walter Quijano." [App. at 71]

o. "Michael was denied his Eighth Amendment right to reliability and individualized sentencing when the prosecution introduced the materially inaccurate testimony of Dr. Walter Quijano." [App. at 71]

p. "The expert opinion offered by Dr. Quijano violated Michael's Eighth and Fourteenth Amendment rights." [App. at 71]

q. "Under the Eighth and Fourteenth Amendment, Michael is exempt from the imposition of death as a penalty because he was the functional equivalent of a juvenile under age 18." [App. at 75]

r. "Cumulative error and due process." [App. at 81]

s. "Cumulative error, ineffective assistance of counsel, and the presumption of prejudice." [App. at 81]

2. Applicant was indicted in a two-paragraph indictment for the offense of capital murder alleged to have occurred on or about October 24, 2001: (A) "intentionally caus[ing] the death of an individual, namely, Sandra Stotler, by shooting Sandra Stotler with a firearm, and the Defendant was then and there in the course of committing and attempting to commit the offense of burglary of a habitation"; and (B) "intentionally and knowingly caus[ing] the death of Sandra Stotler by shooting Sandra Stotler with a firearm, and on or about October 24, 2001, in the County and State aforesaid, and during the same scheme and course of conduct, the Defendant did then and there intentionally and knowingly cause the death of James Adam Stotler and Arnold Jeremy Richardson by shooting James Adam Stotler and Arnold Jeremy Richardson with a firearm." [CR-1 12] The State elected to seek the death penalty on September 4, 2002. [CR-1 95-96]

3. On November 8, 2002, Applicant filed a motion to suppress his statement, which was denied on December 18, 2002, after hearings held on November 25 and December 18, 2002. [CR-1 161-166, CR-4 615-617; RR-3 12, 234, RR-4 4, 38, 39-40] The trial court filed its written findings of fact and conclusions of law on March 27, 2003. [CR-4 615-17]

4. On January 17, 2003, the State abandoned Paragraph B of the indictment. [CR-4 497-99] Applicant pleaded not guilty to Paragraph A alleging the murder of Ms Stotler in the course of committing or attempting to commit burglary. [RR-15 22]

5. On February 24, 2003, a jury found Applicant guilty as charged in Paragraph A of the indictment. [CR-4 597; RR-19 64] On February 28, 2003, after hearing additional evidence on punishment, the jury answered "yes" to the first special issue, which asked whether Applicant posed a continuing threat to society; and "no" to the second special issue, which asked whether there were sufficient mitigating circumstances to warrant a life sentence. [CR-4 604, 605; RR-27 74-75]

6. On February 28, 2003, the trial court sentenced Applicant to death according to law. [CR-4 606-609; RR-27 75-76]

7. Applicant filed a motion for new trial on March 27, 2003, which was denied on April 3, 2003, without a hearing. [CR-4 618-21, 623]

8. On December 15, 2004, the Court of Criminal Appeals affirmed the judgment of the trial court. *Perry v. State*, 158 S.W.3d 438 (Tex. Crim. App. 2004). Applicant's motion for rehearing was denied and mandate issued on March 9, 2005.

9. On June 7, 2005, Applicant filed a petition for writ of certiorari in the United States Supreme Court, which is pending.

10. Applicant's claim that the testimony of the assistant medical examiner, Dr. Schrode, established Ms. Stotler's death at a time when he was in jail, is based on the reporter's record of his trial and is not new evidence.

11. Applicant presents no additional evidence in support of his assertion that the testimony of Dr. Schrode established Ms. Stotler's death at a time when he was in jail.

12. Based on the reporter's record, Applicant was in jail at the time he claims Ms. Stotler died because he led a high speed chase in Ms. Stotler's car and evaded arrest after he wrecked the car. [RR-15 222-24, 229]

13. Based on the reporter's record, Applicant used the driver's license of Ms. Stotler's son for identification, and was booked into jail, released, and bonded as "James Adam Stotler." [RR-15 229, 231-32] James Adam Stotler had also been murdered by Applicant and Jason Burkett. [RR-23 29-32, RR-28 State's Ex 149]

14. Based on the reporter's record of Applicant's testimony, Applicant never claimed that Ms. Stotler's car was stolen before Ms. Stotler was murdered. [RR-18 49-95]

15. Applicant does not explain in his application how he could have been in possession of both Ms. Stotler's vehicle and Adam Stotler's driver's license if he had not already committed his offense.

16. Applicant fails to cite to any exhibit reflecting "40 individual documents in the offense report"

that state the murders occurred on October 27, 2001. [App. at 20]

17. Based on the reporter's record, Applicant and Jason Burkett were at Nite Life around 10:00 p.m. on Wednesday, October 24, 2001, showing off "their" new cars. [RR-16 191, 192-94]

18. Applicant does not explain in his application how he and Jason Burkett could have been showing "their" new cars on Wednesday, October 24, 2001, if Ms. Stotler had not already been murdered.

19. Based on the recording of Applicant's statement at the Conroe Regional Hospital, Applicant was not in such great pain or fear that he could not give a true statement then or at the time of his arrest. [State's Exhibit 127 at trial; State's Answer, Exhibit A]

20. Based on the recording of Applicant's statement at the Conroe Regional Hospital, Det. Mace did not suggest the details Applicant provided. [State's Exhibit 127 at trial; State's Answer, Exhibit A]

21. Based on the reporter's record, Det. Mace first learned that Adam Stotler and Jeremy Richardson were dead from Applicant's confession, and Applicant provided the necessary information to find the bodies of Adam Stotler and Jeremy Richardson. [RR-23 20, 24]

22. Based on the reporter's record, Paramedic Bonnie Montgomery observed that Sgt. Blair was not hostile towards Applicant and did not

threaten him during the ambulance ride. [RR-16 56]

23. The Court is familiar with the reputation of and the effective assistance that trial counsel Don Cantrell and Stephen Taylor provided Applicant and have provided other defendants in the courts of Montgomery County.

24. Based on the credible affidavits of Mr. Cantrell and Mr. Taylor, Applicant did not complain to counsel that he had been beaten or strangled during the ambulance ride after his arrest.

25. Based on the credible affidavit of Mr. Cantrell, Applicant admitted that his injuries all occurred while he was trying to evade arrest. [State's Ans-Ex B at 4]

26. Based on the reporter's record, Applicant did not testify that he was beaten or strangled during the ambulance ride. [RR-18 84-85, 186]

27. Based on the reporter's record, Megan Lazrine testified that Applicant drank a whole bottle of Alize on Monday evening the day before his arrest. [RR-16 22]

28. Based on the reporter's record, Ms. Lazrine testified that on Monday night before his arrest, Applicant was at a park with her and a group of people when a full bottle of Hot Damn was being passed around. [RR-16 26-27]

29. Based on the reporter's record, Aaron Davidson testified that on Monday night before Applicant's arrest, he went to a park to drink beer and Applicant was there. [RR-15 268, 270]

30. Based on the reporter's record, Mr. Davidson testified that on Monday night before Applicant's arrest, Applicant was "intoxicated," meaning he was starting to lose some of his control or abilities, not "falling down" drunk. [RR-5 276-77]

31. Based on the reporter's record, Mr. Davidson testified that Applicant went from the park to an IHOP to eat before going to sleep, and Mr. Davidson did not recall Jason or Applicant drinking in the process of going to sleep between 11:00 and 1:00 a.m. [RR-15 277]

32. Based on the reporter's record, Applicant testified that on the night before his arrest, he started drinking during the day before going to Sawmill Park. [RR-18 87-88] Applicant testified that he was drinking beer and finished off a bottle of Hot Damn. [RR-18 88]

33. There is no evidence showing that Sarah Buehler was with Applicant, Jason Burkett, and Aaron Davidson when Deputy Smith found them on Tuesday morning or that she was present during Applicant's arrest.

34. There is no evidence showing that Sarah Buehler was present when Applicant gave his confession.

35. Sarah Buehler has no personal knowledge of Applicant's condition at the time of his arrest or at the time he gave his confession.

36. The reporter's record adequately reflects that Applicant was drinking the night before his arrest.

37. The statement of Joseph Mitchell to Deputy Degner is the only report of anyone allegedly seeing Adam Stotler after Wednesday, October 24, 2001.

38. Applicant does not reconcile Mr. Mitchell's alleged sighting of Adam Stotler on Saturday night, October 27, 2001, with Applicant's arrest on Friday, October 26, 2001, after wrecking Ms. Stotler's car and identifying himself as "Adam Stotler."

39. Applicant fails to show by a preponderance of the evidence that the assistant medical examiner gave Applicant an "iron clad alibi."

40. Applicant does not provide the two letters that Jason Burkett allegedly sent Applicant, raising doubt about Applicant's guilt.

41. Based on Applicant's confession and the reporter's records of Applicant and Jason Burkett's trials, Ms. Stotler was murdered before Adam and Jeremy. [RR-21 State's Ex 129, RR-28 State's Ex 149; Burkett RR-18 249, 251-52]

42. Jason Middleton's statement about Jason Burkett getting "a rush from killing the two boys," corroborates Applicant's confession that he murdered Ms. Stotler and Jason murdered Adam and Jeremy.

43. Based on the credible affidavits of Mr. Cantrell and Mr. Taylor, Applicant never told counsel that he was dominated by Jason Burkett. Rather, Applicant referred to Mr. Burkett as "a red-neck punk" and averred that Mr. Burkett

could not control Applicant or force him to do anything he did not want to do.

44. Based on the reporter's record of Jason Burkett's trial, Shane Atkinson found Applicant the more intimidating of the two. [Burkett RR-18 247-52, Burkett RR-19 26]

45. Based on the reporter's record of Jason Burkett's trial, Shane Atkinson testified that Jason seemed a "decent kid," but Applicant was "real cocky" and "liked to brag and make hisself [sic] out to be a tough guy." [Burkett RR-19 25, 55]

46. Mr. Sedillo's statement that Jason Middleton told him that "Burkett said he had shot the woman, blaming his drugged up condition had made him loose control," is not reflected in Jason Middleton's affidavit. *Compare,* App-Ex 15 *with* App-Ex 17.

47. Mr. Sedillo's affidavit does not show "common knowledge" in the jail that Jason Burkett was "declaring repeatedly that 'Perry didn't do it.'" *See*, App-Ex 15.

48. Based on the reporter's record, Applicant took full credit for Ms. Stotler's death prior to trial. [RR-16 107 (oral statement); RR-21 State's Ex 129 (written statement); RR-16 212 (statement to Shane Albritton); RR-16 25 (statement about making the front page of the newspaper); RR-17 177-78, 189 (statement to the jail nurse)]

49. The first time that Applicant claimed not to have anything to do with Ms. Stotler's death was at his trial. [RR-18 93-94]

50. In his affidavit, Jeremy Vogel does not state corroborating circumstances showing the trustworthiness of Kristin Willis's alleged statements that she participated in the murders and got a "rush" out of them. *See* App-Ex 15.

51. Applicant presents no evidence that Ms. Willis admitted to anyone else that she participated in the murders and got a "rush" out of them.

52. Applicant does not present the affidavit of Ms. Willis admitting the statements reported by Jeremy Vogel.

53. Kristin Willis has provided an affidavit stating that she does not know Jeremy Vogel and did not meet him at a motel. [State's Ans-Ex E at 1]

54. In her affidavit, Ms. Willis denies stating to Jeremy Vogel or anyone that the murders gave her a "rush" or that she would do it again and did not have any remorse. [State's Ans-Ex E at 1]

55. Based on the reporter's records of Applicant and Jason Burkett's trials, Kristin did not play any role in the murder of Sandra Stotler. [RR-16 241-42, Burkett RR-18 102-08, 192]

56. The Court is familiar with the professional conduct and investigative assistance of District Attorney's Investigator Heather Cash, who has served several years as the investigator for the trial team in the 221st District Court and for the trials in this and co-defendant Jason Burkett's trials, and finds the affidavit of Inv. Cash credible.

57. Based on the credible affidavit of Inv. Cash, even if Jeremy Vogel does not "do drugs" as he states in his affidavit, he was convicted for felony possession of a controlled substance on January 25, 1993, and a misdemeanor possession of a dangerous drug on April 13, 2002. [State's Ans.-Ex D at 4-5]

58. Based on the credible affidavit of Inv. Cash, Jeremy Vogel was convicted for misdemeanor possession of a prohibited weapon on April 13, 2002. [State's Ans-Ex D at 5]

59. The affidavit of Jeremy Vogel's affidavit is not credible evidence.

60. Jeremy Vogel's affidavit does not prove by a preponderance of the evidence that Kristin was involved in Ms. Stotler's murder, or that Kristin, and not Applicant, helped Jason dump Ms. Stotler's body into Crater Lake.

61. Applicant provides no citation to an exhibit and provides no specific facts in support of his claim that "[t]he statements of Shane Atkinson and Jonathan Kohut obtained by the officers both give an alibi for Michael for the evening of October 24, 2001." [App. at 23]

62. The reporter's record of Jason Burkett's trial reflects that Vance Frerichs testified that when he returned home between 7:30 and 8:00 p.m. on a Wednesday night in October 2001, he noticed a pickup truck at the Stotler's residence that he had never seen there before. [Burkett RR-17 17, 18, 19, 20] The truck was a dark-colored, Chevrolet short-bed, and was backed

about halfway past the driveway towards the back of the property. [Burkett RR-17 21]

63. The reporter's record of Jason Burkett's trial reflects that Mr. Frerichs's 11-year-old daughter heard gunshots at about 7:30 p.m. the same night her father saw the truck he had never seen before at the Stotler's residence. [Burkett RR-18, 9, 10, 11, 15, 16]

64. The affidavit of Carol Vasconsuelos, does not prove by a preponderance of the evidence that Applicant is innocent.

65. Applicant provides no letter from Jason Burkett to Applicant asking why he confessed. [App. at 23]

66. Jason Burkett's alleged statement to Jenny Buehler, that "he, Burkett, killed all three victims with his ex-wife," is inconsistent with Applicant's testimony at trial and with the theory presented in Applicant's application on page 22, that Jason killed Ms. Stotler with the help of Kristin Willis.

67. Applicant does not state the names of the detectives who allegedly told Jenny and Sarah Buehler that they would be charged with murder if they [did not /s/ [S S] made a statement.

68. The Court is familiar with the professional reputations of Montgomery County Sheriff's Detectives Tommy Overstreet and Tom Gannuci. The Court finds the affidavits of Dets. Overstreet and Gannuci credible.

69. Based on the credible affidavit of Det. Overstreet, both Sarah and Jenny Buehler were cooperative during his investigation of this case, and Det. Overstreet did not threaten to charge Sarah or Jenny Buehler with murder if they failed to give a statement. [State's Ans.-Ex F at 1-2]

70. Based on the credible affidavit of Det. Gannuci, neither Det. Melanie Wood, nor Det. Gannuci threatened or made promises to Sarah and Jenny Buehler for their statements. [State's Ans.-Ex G at 1]

71. The Court is familiar with the professional reputation and investigative work of Montgomery County Sheriff's Detective Carey Mace, who was the lead detective in this case and assisted the prosecution team at trial. The Court finds the affidavit of Det. Mace credible.

72. Based on the credible affidavit of Det. Mace, Jenny and Sarah Buehler cooperated with the investigation. [State's Ans.-Ex H at 3]

73. Based on the credible affidavit of Inv. Cash, Inv. Cash did not tell Sarah or Jenny Buehler to say that Burkett committed all three murders and to not talk to Applicant's lawyers. [State's Ans-Ex D at 2]

74. Based on the reporter's record, there is no evidence to show that Megan Lazrine was standing near the ambulance when Applicant talked to Det. Mace. [RR-16 60]

75. Applicant fails to prove by a preponderance of the evidence that he is actually innocent.

76. The Court is familiar with the professional reputation of First Assistant District Attorney David Bluestein, who has represented the State in the courts of Montgomery County for over ten years and who had also ably represented many criminal defendants in Montgomery County while in private practice. The Court finds the affidavit of Mr. Bluestein credible.

77. The Court is familiar with the professional reputation of Assistant District Attorney Robert Bartlett, who has represented the State in criminal matters in the courts of Montgomery County for over ten years, ~~and has been the chief prosecutor in the 221st District Court.~~ The Court finds the affidavit of Robert Bartlett credible.

78. Applicant admits in his application that Victor Neal did not falsely testify at his trial about whether he was granted immunity for his testimony. [App. at 26 n.48]

79. Based on the reporter's record, Victor Neal was not asked about immunity or any agreement with the State by either party. [RR-18 249-69, RR-24 215-40]

80. Based on the reporter's record of Jason Burkett's trial, Victor Neal testified that he was granted immunity for his testimony, although he had nothing in writing. [Burkett RR-17 291]

81. Based on the credible affidavits of Mr. Bluestein, Mr. Bartlett, and Ms. Cash, and the reporter's records of Mr. Neal's testimony at both Applicant's and Mr. Burkett's trials, the

evidence was insufficient to prove that Mr. Neal was more than merely present during the burglary, and Mr. Neal was not present or involved in the murders of Sandra Stotler, Adam Stotler, or Jeremy Richardson.

82. Applicant never implicated Mr. Neal in his confession or in his testimony at trial as being involved in the burglary or murders.

83. Based on the reporter's record of Jason Burkett's trial, the Court's personal recollection, and the credible affidavit of Mr. Bartlett, the State allowed testimony of an "immunity agreement" as a trial tactic to show that Applicant and Jason Burkett committed burglary. [Burkett RR-17 292-95, State's Ans-Ex L at 3]

84. The State did not suppress evidence of an "immunity agreement" with Victor Neal.

85. Based on the reporter's record, Applicant impeached Victor Neal with his motive to testify. [RR-24 238-40]

86. Based on the reporter's record, the following physical evidence corroborates Applicant's confession and was not proved through Victor Neal's testimony:

    a. The decomposing body of Sandra Stotler was found in Crater Lake. [RR-15 30, 35, 101; RR-16 88]

    b. The body was wrapped in a comforter, a blanket, and a sheet, which matched the sheet remaining on Ms. Stotler's bed. [RR-15 64, 67, 82, 189, 190, 191, 192]

c. The passageway to the lake was exactly as Applicant had described – a dirt road with a big bump near a pipeline, with an old stripped out truck on the right side of the road. [RR-15 32, 33, 50; RR-16 109-10]

d. Tire tracks found near the lake were consistent with a truck twice speeding backwards then suddenly stopping. [RR-15 84, 85; RR-16 110, 111; RR-20 State's Ex 8, 9]

e. Ms. Stotler had been shot twice in the back with a shotgun from a distance of about three to four feet. [RR-15 99, 106, 109, 110]

f. The blood spatter patterns in the entryway "were consistent with back spatter from the high velocity gunshot wound from a large bore weapon." [RR-16 263]

g. The back spatter patterns indicated that Ms. Stotler was shot twice, once while standing and once while she lay on the floor. [RR-16 264, 265-67]

h. A spent shotgun casing recovered on the floor of the laundry room was fired from the shotgun recovered at the scene of Applicant's arrest. [RR-15 145, 169; RR-17 47; RR-20 State's Ex 64A]

i. Bloody drag marks and partial shoe prints went from the entryway of the small hallway to the middle of the garage. [RR-15 145, 185, 187; RR-16 268]

j. The DNA profile derived from blood recovered in the bed of Kristin Willis's truck matched Ms. Stotler's known DNA profile. [RR-16 156, RR-17 71]

k. Applicant and Jason Burkett were seen at Nite Life the night of the murder, Wednesday, October 24, 2001 – Applicant was in the red Camaro and Jason in the white Isuzu. [RR-16 189, 191, 192, 193-94]

l. On October 25, 2001, at about 11:00, Applicant went to the Good Shepherd Mission in Huntsville, a homeless shelter, looking for his mail and showed off a red Camaro convertible. [RR-24 172, 178, 179] A white male driving a white Isuzu Rodeo also pulled up with Applicant. [RR-24 180]

87. Based on the reporter's record, the following evidence was not obtained through Victor Neal's testimony and showed that Applicant admitted his guilt to the following friends and acquaintances.

a. Shane Atkinson, the tattoo shop owner, testified that Applicant told him that "he had killed someone and took the vehicles." [RR-16 200, 201, 212]

b. Melinda Gray[1] testified that when the Conroe Courier carried an article about a

[1] Also referred to as Megan Lazrine in the record. [RR-16 10] Ms. Gray's full name is "Megan Lee Lazrine Gray." [RR-16 10] At trial, Ms. Gray explained that she had recently married. [RR-16 10]

body being recovered at Crater Lake, Applicant used the phone in her presence and told the person he was talking with that "they had made the front page." [RR-16 24, 25]

c. Ian McCoin also testified that he was at Megan's apartment when Applicant and Jason "were talking about making the newspaper and saying that they killed three people." [RR-24 271]

d. Vicki Howard, the medical supervisor for the Montgomery County Jail, testified that Applicant said he shot a woman. [RR-17 177-78, 189]

88. Based on the reporter's record, the evidence of Applicant's guilt is overwhelming.

89. Based on the record of Jason Burkett's trial, Jason Burkett was convicted of capital murder [Burkett RR-27 118], even though the fact that Mr. Neal believed he had immunity for his testimony was brought out on cross-examination. [Burkett RR-17 291-92]

90. Applicant was sentenced to death and Jason Burkett was sentenced to life. [RR-27 75, Burkett RR-37 219]

91. Based on the record of Applicant and Jason Burkett's trials, Victor Neal testified at the punishment phase of Applicant's trial [RR-24 215-40], but not at the punishment phase of Jason Burkett's trial.

92. Before Victor Neal testified at the punishment phase, Applicant had already told the jury that he was unemployed and doing "lots of drugs, drinking, and hanging out." [RR-18 71, 78, 79]

93. Before Victor Neal testified at the punishment phase, the evidence showed that:

    a. Applicant had a gun and had engaged in deadly conduct [RR-24 188, 204-05, 208], and

    b. Applicant and Jason wanted to steal cars [RR-16 229, 238, 239; RR-21 State's Ex 129]

94. At the punishment phase, evidence other than Victor Neal's testimony showed:

    a. Applicant was arrested for presenting a forged prescription for 100 pills of Xanax [RR-24 285, 287; RR-25 10, 11];

    b. Applicant had pointed a loaded shotgun at Megan Lazrine and said, "I have already killed somebody, it's not going to hurt me to kill anyone else" [RR-24 259-60, 276]

    c. Applicant had also bragged to Sandra Heffernan that "he done a drive-by on the Latin Kings." [RR-24 188] Applicant talked a lot about the street gangs, the Latin Kings and Crips, and did gang signs. [RR-24 189-90]

    d. Roxanna Mapes testified that her daughter and Applicant were arrested on May 22, 2001, for deadly conduct. [RR-24 203]

95. Based on the reporter's record, although Victor Neal's testimony about Applicant and Jason Burkett's plans to steal cars showed the planning that went into the murders, no cars were stolen and no one was hurt or murdered. [RR-24 227-32]

96. Based on the reporter's records of Applicant and Jason Burkett's trials and the Court's personal recollection, there were substantial differences in the punishment evidence that explain or support a life sentence for Jason Burkett, including:

    a. Applicant volunteered a full and detailed confession that led to the discovery of the bodies of Adam Stotler and Jeremy Richardson, and matched the physical evidence and Applicant's statements bragging to friends and acquaintances but then, against the advice of trial counsel, testified that his confession was false, involuntary, and coerced. [RR-18 90-94] Applicant's testimony was callous and remorseless. [RR-18 48-94] Jason did not give a statement to law enforcement and did not testify at trial.

    b. Applicant was adopted at birth by caring, law-abiding, stable, hard-working parents – Applicant's father was an engineer with an oil company and Applicant's mother was a teacher. [RR-26 9-11, 194] Jason's parents met in jail [Burkett RR-37 23-24], worked sporadically [Burkett RR-37 24, 25, 26, 28, 31] or made money selling drugs. [Burkett RR-37 27] Jason's family

was homeless and hungry because his father was spending money on "drugs, alcohol and other – other things." [Burkett RR-36 39, 40, 318] Jason's father was "mostly in prison" after Jason was five years old [Burkett RR-36 17-18, 277]. Jason's mother developed an aneurism [Burkett RR-36 51] and would take off and leave her children alone [Burkett RR-36 318].

c. Applicant presented no evidence at trial, and presents no evidence in his application, that he had any severe health problems before murdering Ms. Stotler. Jason Burkett failed to thrive after his birth and weighed only ten pounds when he was five months old, suffered from projectile vomiting, had "spiking fevers," a neuroblastoma or "mass behind your heart," cancer and chemo-therapy, five surgeries, and was "continuously" in and out of the hospital from birth to age five. [Burkett RR-36 85-86, 153; RR-37 41] Jason's mother abused crystal meth and cocaine when she was pregnant with Jason, and Jason's psychological tests also showed a "good clear fit with the profile" of a meth child and brain damage. [Burkett RR-36 113, 117-18, 155; Burkett RR-37 36]

97. Applicant does not provide a copy of the alleged second typewritten statement of Victor Neal he claims was provided to law enforcement. [App. at 24, 30]

98. The Court is familiar with the careful, professional work of Montgomery County District Attorney's legal assistant April Knudsen. The Court finds the affidavit of April Knudsen credible.

99. Based on the credible affidavit of Det. Mace, Victor Neal did not provide a second typewritten statement [State's Ans-Ex H at 1-2], or in the alternative, based on the credible affidavits of David Bluestein, Robert Bartlett, Heather Cash, and April Knudsen, the State did not suppress an alleged second typewritten statement provided by Victor Neal.

100. Mr. Neal states in his statement dated December 21, 2004, included as Exhibit 13 of Applicant's application, that his "typed statement said basically the same things that I later put in a handwritten statement I mailed to Detective Gaze [sic] in April of 2002." [App-Ex 13]

101. There is no exculpatory information in favor of Applicant in Victor Neal's statement to Det. Mace. [State's Ans-Ex H]

102. Based on the reporter's record of Jason Burkett's trial, and the Court's personal recollection, Jason Burkett did not give a statement to law enforcement officers.

103. Applicant does not provide proof that Jason Middleton, Jeremy Vogel, or Patrick Sedillo informed law enforcement of Jason Burkett's alleged statements admitting he killed Sandra Stotler. [App-Ex 15, 16, 17]

104. Based on the credible affidavit of Inv. Cash, Mr. Middleton was convicted for theft and failure to identify on July 2, 2002; burglary of a habitation on September 22, 2002; theft on August 14, 2003; unauthorized use of a motor vehicle on February 24, 2004; and forgery on July 1, 2004. [State's Ans-Ex D at 5]

105. The affidavit of Mr. Middleton is not credible evidence.

106. Based on the credible affidavit of Inv. Cash, Jason and Applicant would have been 14 or 15 years old when Mr. Vogel allegedly met them in an adult night club in 1997; however, Applicant was not even in Texas in 1997. [State's Ans-Ex D at 3-4]

107. Based on the credible affidavit of Inv. Cash, Mr. Vogel was convicted for possession of a controlled substance on January 25, 1993. [State's Ans-Ex D at 4]

108. Based on the credible affidavit of Inv. Cash, Jason Burkett and Patrick Sedillo never had court appearances on the same day. [State's Ans-Ex D at 5-6]

109. The affidavit of Patrick Sedillo is not credible evidence.

110. Based on the credible affidavit of Det. Mace, Jason Burkett never made a statement about the murders to Det. Mace, and no one has brought to Det. Mace's attention any inculpatory statement made by Mr. Burkett. [State's Ans-Ex H at 2]

111. Applicant provides no evidence showing that law enforcement officers knew the location of the bodies of Adam Stotler or Jeremy Richardson prior to his confession.

112. Based on the reporter's record, Det. Mace first learned that Adam Stotler and Jeremy Richardson were dead when Applicant described their shootings shortly after his arrest. [RR-23 20-21]

113. Applicant provides no evidence other than the number of hours that trial counsel spent with him in the Montgomery County Jail to support his claim that trial counsel spent insufficient time with Applicant.

114. Based on the credible affidavits of trial counsel Don Cantrell and Stephen Taylor, describing the contacts they had with Applicant and his family by phone and letters in addition to the time spent visiting Applicant, Applicant fails to prove by a preponderance of the evidence that insufficient time was spent.

115. Based on the credible affidavit of Mr. Cantrell and the reporter's record of Applicant's trial, Sarah Buehler's testimony would have been cumulative of the evidence that Applicant used drugs and alcohol the night before his arrest.

116. Given the overwhelming evidence recounted above, Applicant fails to prove that he, like some of the students who attended Casa by the Sea, gave a false confession.

117. Based on the reporter's record of the trial and the credible affidavit of Mr. Cantrell, whether some students who attended Casa by the Sea have given false confessions is irrelevant to whether Applicant gave a false confession.

118. Based on the credible affidavit of Robert Bartlett, the State had an open file policy, and photos of Kristin Willis's Currants shirt, Kristin's statement admitting that the shirt was hers, the fact that presumptive tests revealed possible blood material and the possible blood looked like high velocity blood spatter, and DNA test results conducted by DPS were included in the State's case file. [State's Ans-Ex K at 3, State's Ans-Ex H at 2-3]

119. Even if Mr. Cantrell does not recall an item identified as a shirt belonging to Kristin Willis that exhibited human blood spatter, Mr. Taylor does recall seeing photos of a shirt belonging to Kristin Willis, a supplemental report, and an Orchid Cellmark report stating that no DNA results were obtained. [State's Ans-Ex B at 3, State's Ans-Ex C at 2]

120. Based on the credible affidavit of Inv. Cash, the DPS DNA Laboratory in Houston could not develop interpretable DNA profile(s) from Kristin's shirt, and the independent laboratory, Orchid Cellmark, could not develop interpretable mitochondrial DNA profile(s) from the shirt. [Ex D at 2-3]

121. Based on the reporter's records of Applicant and Jason Burkett's trials, Kristin was at work at

least until the store closed at 8:00 p.m. on Wednesday, October 24, 2001. [RR-16 229, 240, 241, 242; Burkett RR-18 102-08, 187-88, 192]

122. Based on the credible affidavit of Det. Carey Mace, neither Applicant nor Jason Burkett implicated Kristin Willis in any of the murders before Applicant's trial. [State's Ans-Ex H at 2]

123. Based on the affidavit of Kristin Willis, Kristin did not see what happened to Sandra Stotler, Adam Stotler, or Jeremy Richardson. [State's Ans-Ex E at 1]

124. Based on the credible affidavit of Mr. Cantrell and Mr. Taylor, Applicant never provided the names of any person in the Montgomery County Jail who had helpful information to his case. [State's Ans-Ex B at 3; State's Ans-Ex C at 2]

125. Based on the credible affidavit of Det. Mace, the Montgomery County Jail records do not reflect that any inmate reported statements by Jason Burkett that were favorable to Applicant. [State's Ans-Ex H at 2]

126. Based on the credible affidavits of Mr. Bluestein and Mr. Bartlett, Victor Neal was not granted immunity for his testimony. [State's Ans-Ex K at 2, State's Ans-Ex L at 1, 3]

127. Applicant does not specify what DNA testing he is claiming trial counsel failed to obtain in proof of Applicant's alleged innocence. [App. at 35-36]

128. Based on the reporter's record and the Court's personal recollection, Applicant voluntarily confessed his crime to Det. Carey Mace. [RR-16 85, 95, 96]

129. Based on the credible affidavit of Mr. Cantrell, the Court's personnel [sic] recollection, and the reporter's record, Mr. Cantrell subpoenaed the personnel file of Montgomery County Sheriff's Deputy Sidney Blair, attempted to prove up certain prior complaints against Deputy Blair, and made a Bill of Exceptions on those complaints. [State's Ans-Ex B at 5; RR-15 326-27]

130. Based on the credible affidavit of Mr. Cantrell, Applicant never informed Mr. Cantrell that he had been assaulted or threatened by Deputy Blair during the ambulance ride. [State's Ans-Ex B at 5]

131. Applicant does not state, personally, that he was beaten or strangled during the ambulance ride, and the reporter's record reflects that Applicant did not complain about being beaten or strangled when he testified at his trial. [RR-18 49-95]

132. Based on the credible affidavit of Mr. Cantrell, Mr. Cantrell investigated the circumstances of Applicant's ambulance ride. [State's Ans-Ex B at 4]

133. Based on the credible affidavit of Mr. Cantrell, Applicant never advised Mr. Cantrell that he had been assaulted by any person during the ambulance ride. [State's Ans-Ex B at 4]

134. Based on the credible affidavits of Mr. Cantrell and Mr. Taylor, pplicant explained to Mr. Cantrell that all o1 his injuries occurred when he tried to evade arrest. [State's Ans-Ex B at 4; State's Ans Ex C at 2]

135. Based on the tape-recorded statement of Applicant at the hospital, and the Court's personal recollection, Applicant did not complain about the ambulance ride in his recorded statement at the hospital and did not sound intimidated or coerced. [State's Ans-Ex A]

136. Applicant did not dispute at trial or in his application Det. Mace's testimony that Applicant "started talking immediately after I introduced myself, saying 'I know it's the needle and I want to save everybody the trouble and just confess.'" [RR-16 95]

137. Applicant did not dispute at trial or in his application Det. Mace's testimony that Applicant had to be interrupted so that he could give Applicant his *Miranda* warnings. [RR-16 96]

138. Based on the credible affidavits of Mr. Cantrell and Mr. Taylor, Applicant never told his trial counsel that his statement was false, coerced, or involuntary. [State's Ans-Ex B at 5; State's Ans-Ex C at 3]

139. Based on the credible affidavit of Mr. Cantrell, all records reflect that Applicant is well above average in intelligence, and perfectly capable of understanding the *Miranda* warnings. [State's Ans-Ex B at 4]

140. Based on the credible affidavit of Mr. Cantrell, Applicant was not under the influence of Jason Burkett who Applicant referred to as a "red-neck punk" [State's Ans-Ex B at 5]

141. Applicant provides no argument or authorities in support of his suggestion that the Court of Criminal Appeals erred in concluding that evidence of Applicant's intoxication and injury did not involve police coercion or over-reaching, and did not raise constitutional voluntariness issues. [App. at 40]

142. Applicant fails to show by a preponderance of the evidence that he was beaten or strangled or that his confession was coerced.

143. Applicant's claim that counsel could not have had any sound trial strategy in failing to stop the State's impeachment of him is based solely on the record of his trial. [App. at 42, 46-47]

144. Applicant's claim that counsel could not have had any sound trial strategy in failing to object to testimony at the guilt-innocence phase that Applicant had murdered others is based solely on the record of his trial. [App. at 46-47]

145. Based on the credible affidavits of Mr. Cantrell and Mr. Taylor, the reporter's record, and the Court's personal recollection, Applicant was thoroughly advised about the extraneous offenses and bad acts that the State intended to show against him, and about the State's right to cross-examine Applicant and to test his credibility as any other witness. [State's Ans-Ex B at 5-6; State's Ans-Ex C at 3]

146. Based on the reporter's record, and the Court's personal recollection, this Court thoroughly advised Applicant of the dangers of testifying orally and in writing. [RR-18 36-44; CR-4 588]

147. Based on the record and the Court's personal recollection, the testimony referencing other murders occurred twice in brief unresponsive answers from two different witnesses – Sgt. Blair and Megan Lazrine. [RR-15 309, RR-16 29]

148. Applicant spontaneously testified, "I was a suspect in a triple homicide or capital murder." [RR-18 85]

149. Based on the credible affidavit of Mr. Cantrell, Mr. Cantrell welcomed the start of Applicant's trial "in that it prevented further reflection concerning the deaths of Affiant's elderly parents." [State's Ans-Ex B at 6]

150. Based on the credible affidavits of Mr. Cantrell, Mr. Taylor, Mr. Bluestein, Mr. Bartlett, Inv. Cash, and the Court's personal recollection, Mr. Cantrell did not appear disinterested or doze or sleep at any time during Applicant's trial. [State's Ans-Ex B at 6; State's Ans-Ex C at 4; State's Ans-Ex K at 3; State's Ans-Ex L at 4; State's Ans-Ex D at 2]

151. Applicant does not assert that co-counsel Stephen Taylor slept or was absent during the guilt-innocence phase of his trial. [App. at 48]

152. Based on the credible affidavits of Inv. Cash and Mr. Bluestein, and the Court's personal recollection, co-counsel Stephen Taylor was present

and an active advocate for Applicant during the guilt-innocence phase. [State's Ans-Ex D at 2; State's Ans-Ex K at 3]

153. Applicant asserts that trial counsel should have sponsored the same evidence about which he complains the State showed on cross-examination. [App. at 53]

154. Based on the credible affidavit of Mr. Cantrell, Mr. Cantrell carefully accumulated all available documentation about Applicant's life involving his mental health and found no evidence that Applicant did not possess the requisite mens rea to commit the offense. [State's Ans-Ex B at 6-7]

155. Based on the reporter's record and this Court's personal recollection, Applicant's detailed confession does not reflect a "diminished" capacity. [RR-21 State's Ex 129, RR-28 State's Ex 149]

156. Based on the reporter's record, trial counsel hired Gilda Kessner, a clinical psychologist with a forensic specialty, to prepare a "mitigation package" and to testify at trial. [RR-26 79-80, 90]

157. Based on the reporter's record, Dr. Kessner:

    a. Interviewed Applicant for a total of seven to eight hours[2] over two days [RR-26 85, 139];

    b. Talked to each of Applicant's adoptive parents for two hours each [RR-26 139], and spent another two hours with his biological

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[2] Applicant asserts that jail records reflect that Dr. Kessner spent three hours with him. [App. at 33]

mother by phone, and also spoke with his biological grandfather and brother by telephone [RR-26 92];

c. Reviewed "the records" and "the literature" [RR-26 138];

d. Explained to the jury how ADHD is consistent with conduct disorder and how teachers, peers, parents, and the child become very negative and frustrated [RR-26 101];

e. Testified that Applicant had connected with a psychiatrist after just one meeting, and that when this psychiatrist committed suicide before seeing Applicant again, Applicant was very hurt and "went in a closet and cried" and kicked a hole in the wall of the closet [RR-26 102-033];

f. Testified that Applicant was the subject of sexual abuse by his older adopted brother, Ryan, or was exposed to the sexual abuse of Ryan by their babysitter [RR-26 154];

g. Testified that in her opinion, Applicant's choice to leave Casa by the Sea before completing their program, "was a very poor choice consistent with his illness" [RR-26 171];

h. Testified to her opinion that when Applicant was 18 he had a maturity level of 15 [RR-26 115];

i. Testified that ADHD "has its roots in genetic and [is] neurological" [RR-26 186];

j. Testified that this incident was "likely related to [Applicant's] immaturity of judgment, poor decision making and [Applicant's] impulsivity" [RR-26 186];

k. Explained the varying levels of custody at TDCJ, and the risk that Applicant would commit future violent acts in prison [RR-26 122-133]; and

l. Explained that Applicant's greatest risk factor is his age, and if he were to go ten years without committing a violent act, the risk would go to zero. [RR-26 133-34]

158. Based on the reporter's record, in addition to Dr. Kessner's testimony, trial counsel presented the testimony of

a. Applicant's biological mother [RR-25 112-154];

b. Applicant's grandfather [RR-25 154-175];

c. Applicant's adoptive aunt and two cousins [RR-25 175-208];

d. Applicant's adoptive father [RR-26 5-78];

e. Applicant's adoptive mother [RR-26 192-236];

f. A program manager for Casa by the Sea [RR-25 208-40];

g. A director of shelter services and former family teacher for Boys Town [RR-25 265-99];

h. A Montgomery County Sheriff's Deputy who refuted the State's evidence that Applicant was the shooter in a drive-by shooting [RR-25 301-07];

i. A retired TDCJ, Parole Department, employee who was a parole board member for nine years. [RR-25 241-64]

159. Applicant's assertion that "trial counsel failed to make even a minimal investigation into potentially mitigating factors" is unfounded. [App. at 54]

160. Based on the reporter's record, Applicant was 19.5 years old when he committed this offense. [RR-26 197, RR-21 State's Ex 129]

161. Applicant does not provide or cite to any medical record measuring his brain functions or show how the studies he cites in his application relate to him in terms of years of alcohol abuse, the amounts of alcohol ingested, age, or other factors. [App. at 55-60, App-Ex 31]

162. Based on the credible affidavit of Mr. Cantrell, Applicant was "never diagnosed by any medical professional, drug recognition expert, psychologist, or educator as having a severe drug addiction to any legal or illegal substance" and never described his drug usage as serious or something he could not control. [State's Ans-Ex B at 6-7]

163. Based on the credible affidavit of Mr. Cantrell, Mr. Cantrell located the adoption agency records and successfully had them unsealed by this

Court to learn the names and history of Applicant's biological family. [State's Ans-Ex B at 7]

164. Based on the reporter's record, the alcohol and drug history of Applicant's biological mother was presented at the punishment phase. [RR-25 124-26]

165. Based on the credible affidavit of Mr. Cantrell, Applicant never denied his involvement in the death of Ms. Stotler until he testified at trial. [State's Ans-Ex B at 7]

166. Based on the reporter's record, Dr. Kessner testified at length about Applicant's behavioral problems as a child, his psychiatric evaluations and treatment. [RR-26 92-117]

167. Based on the reporter's record, while Dr. Kessner testified on cross-examination that there are a large number of people with substance abuse problems and addictions who do not commit violent acts, and that the commission of violent criminal acts is not considered in the DSM-IV as a criteria for substance abuse, nor for diagnosing ADHD [RR-26 148, 156-57]; Dr. Kessner also testified that "there certainly is a genetic tickling in mental illness and in substance abuse. And exposure to toxic materials or drugs and alcohol during the pregnancy, especially the first trimester, is also linked to behavior disorders, mental illness, that sort of thing. So, there – I would say that there's reasonable expectation for link there." [RR-26 150-51]

168. Based on the reporter's record, Dr. Kessner testified that ADD and ADHD were caused by genetic or in utero factors [RR-26 151-52]; and that "I'm sure that there was some willful behavior but when you have a child who has severe ADHD, you have a lot of behavior that is not calculating and willful but is based on the illness." [RR-26 156]

169. Based on the reporter's record, Dr. Kessner explained that this psychiatric evaluation conducted on August 20, 1997, showed the progression of Applicant's illness:

> The patient has had problems since eight years of age starting with hyperactivity. Since the fifth grade when he was 11 years old the child has had more serious problems starting with poor school performance. Most recently in the last year school expulsions, vandalism, running away, lying, mood swings and poor self-esteem have been noted by the parents. Last week the youngster took a 12 gauge shotgun, found a shell, loaded the gun, and threatened his parents. This summer he was kicked out of a three-week camp.

[RR-26 169]

170. Based on the reporter's record, Dr. Kessner testified about the nexus between ADHD and other problems. [RR-26 101, 167-73]

171. Applicant does not provide evidence or a citation to medical records showing where in his "history" he was diagnosed with Bipolar Disorder. [App. at 63]

172. Based on his credible affidavit, Mr. Cantrell was not aware of any pre-trial diagnosis of Applicant that he suffered from Bipolar Disorder." [Ex B at 7]

173. Based on the reporter's record, neither Dr. Kessner nor Dr. Quijano testified that Applicant had been diagnosed with Bipolar Disorder. [RR-26 79-192, RR-26 237-76]

174. The diagnosis of Bipolar Disorder first appears in a TDCJ medical record dated September 17, 2004, a few months before his application for writ of habeas corpus was filed, over 18 months after Applicant's trial, and about one month after Applicant began taking lithium carbonate. [App-Ex 35, § 2 at 3, 4, 11]

175. At least until September 2004, Applicant did not experience suicidal tendencies that characterize bipolar disorder. [App-Ex 35, § 2 at 10 ("Neg suicide hx.")]

176. Applicant provides seven articles about bipolar disorders being missed or misdiagnosed in children, but these articles cite the paucity of research and none link the disorder to crime. [App-Ex 28 art.1 at 1 ("preliminary study"), art.2 at 2 ("may exist"), art.3 at 1 ("paucity of research"), art.4 at 1 ("because studies are lacking"), art.5 at 1 ("[s]ystematic research on

pediatric BP is in its infancy"), art.6 at 2 ("understudied"), art.7 at 2 ("strikingly limited")]

177. Based on the reporter's record, Kristin Willis did not testify that Jason Burkett admitted to her that [Applicant] did not kill Ms. Stotler. [RR-16 237-76]

178. Based on the reporter's record, Dr. Walter Quijano is well qualified to testify as a psychiatric expert in a death penalty case. [RR-26 237-41] Applicant does not claim otherwise.

179. Based on the reporter's record, Dr. Quijano based his opinion on Applicant's treatment, clinical, hospital, and jail records, and Applicant's conduct. [RR-26 240-42, 264]

180. Based on the reporter's record, the State did not pose a hypothetical question based on the facts of the case to Dr. Quijano. [RR-26 237-76]

181. Based on the reporter's record, Dr. Quijano did not give an opinion on Applicant's future dangerousness. [RR-26 265]

182. Applicant fails to prove by a preponderance of the evidence that trial counsel's performance was deficient.

183. Applicant does not present or propose a test for determining whether a defendant is functioning at the mental equivalent of a person under 18 years of age. [App. at 75]

184. Applicant presents several studies that suggest the brain matures at about age 20. [App-Ex 37 at 7, 12, 14]

185. The *amicus curiae* brief of the American Psychiatrists Association also includes a study based on a 1,000 person sample, that "psychosocial maturity" is complete by age 19. [State's Ans-Ex S at 4]

186. Applicant provides no contrary authorities or evidence to the list of authorities cited in *Roper v. Simmons*, 125 S.Ct. 1183, 1194, 1195, 1197-98, 1199-1200 (2005), showing that a juvenile who committed capital murder under 18 years of age should be exempt from execution.

187. In *Roper*, the United States Supreme Court did not comment on the emerging technologies of neuroimaging, nor the alleged three general differences between the brains of juveniles under 18 and adults due to myelination and pruning. *Compare Simmons*, 125 S.Ct. at 1995 *with* State's Ans-Ex S at 5-6, 9.

CONCLUSIONS OF LAW

1. There are no material, previously unresolved issues of fact that are material to the legality of Applicant's conviction and sentence and, there being ample evidence in the record for the Court to rule on the relief sought, an evidentiary hearing is not required.

2. Applicant fails to establish by clear and convincing evidence that a jury would acquit him based on his newly discovered evidence. *Ex parte Elizondo*, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996).

3. Applicant's claim that the testimony of the assistant medical examiner established Ms. Stotler's death at a time when Applicant was in jail is a record claim that is not cognizable on application for writ of habeas corpus. *Ex parte Townsend*, 137 S.W.3d 79, 81 (Tex. Crim. App. 2004); *Ex parte Gardner*, 959 S.W.2d 189, 199 (Tex. Crim. App. 1998) (op. on reh'g); *Ex parte Banks*, 769 S.W.2d 539, 540 (Tex. Crim. App. 1989).

4. Based on the record of Applicant's trial, evidence of other arrests by Sgt. Blair would not have been admissible at Applicant's trial. Tex. R. Evid. 404(a)(3) & (b), 607, 608, 609.

5. Applicant fails to prove by a preponderance of the evidence his claims of *Brady* violations by the State. *Ex parte Richardson*, 70 S.W.3d 865, 870 (Tex. Crim. App. 2002); *Strickler v. Greene*, 527 U.S. 263, 289-90 (1999).

6. In the alternative, even if Victor Neal's testimony had been entirely discredited by evidence of an immunity agreement, if one existed, Applicant fails to prove by a preponderance of the evidence that there is a "reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different." *Ex parte Richardson*, 70 S.W.3d at 870; *Strickler*, 527 U.S. at 291-94.

7. Applicant fails to prove by a preponderance of the evidence his claims of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 689 (1984); *Hernandez v. State*, 988 S.W.2d 770, 770, 772 (Tex. Crim. App. 1999).

8. Applicant's intoxication and injury do not raise constitutional voluntariness issues about his confession. *Colorado v. Connelly*, 479 U.S. 157, 163-66 (1986); *Perry v. State*, 158 S.W.3d 438, 445 (Tex. Crim. App. 2004).

9. Applicant's claim that trial counsel should have stopped the State's cross-examination of him is a record claim that is not cognizable on application for writ of habeas corpus. *Ex parte Townsend*, 137 S.W.3d at 81; *Ex parte Gardner*, 959 S.W.2d at 199; *Ex parte Banks*, 769 S.W.2d at 540.

10. In the alternative, the State's questions were not objectionable. *See* State's Ans-Ex N, reply to Point of Error One on direct appeal.

11. Even if trial counsel Don Cantrell had slept through parts of Applicant's trial, Applicant does not assert the same of co-counsel Stephen Taylor, and no deprivation of counsel is shown. *Ex parte McFarland*, 163 S.W.3d 743, 752-53 (Tex. Crim. App. 2005).

12. Applicant's claim that trial counsel should have presented evidence of his bipolar disorder is based upon a diagnosis by psychiatrists at TDCJ-ID 18 months after trial and unsettled theories of mental illness, and no deficient performance of trial counsel is shown. *See Ex parte Welch*, 981 S.W.2d 183, 184 (Tex. Crim. App. 1998).

13. Because Kristin Willis did not testify that Jason Burkett told her Applicant did not kill Ms. Stotler, no deficient performance is shown in

trial counsels' alleged failure to request an instruction requiring individualized sentencing.

14. Dr. Quijano's testimony about the factors he considers in determining whether a person poses a continuing danger is not undercut by the absence of peer review or empirical studies, and no deficient performance of trial counsel is shown. *Nenno v. State*, 970 S.W.2d 549, 560-62 (Tex. Crim. App. 1998), *overruled on other grounds*, *Terrazas v. State*, 4 S.W.3d 720 (Tex. Crim. App. 1999); *see also Johnson v. Cockrell*, 306 F.3d 249, 255 (5th Cir. 2002).

15. Dr. Quijano's testimony was not excludable on the basis that he did not conduct a personal examination of Applicant, and no deficient performance of trial counsel is shown. *Barefoot v. Estelle*, 463 U.S. 880, 903 (1983), *superseded by statute on other grounds Slack v. McDaniel*, 529 U.S. 473 (2000); *Fuller v. State*, 829 S.W.2d 191, 195 (Tex. Crim. App. 1992).

16. "[E]qually qualified experts may rationally reach contrary opinions based upon the same data," and Applicant's expert on application for writ of habeas corpus, Dr. Mark Cunningham, is entitled to have a different opinion than Dr. Quijano. *Ex parte Briseno*, 135 S.W.3d 1, 13 n.52 (Tex. Crim. App. 2004). No deficient performance of trial counsel is shown.

17. Applicant had the assistance of a psychological expert and fails to prove a due process violation in the testimony of Dr. Quijano. *Barefoot*, 463 U.S. at 901.

18. Applicant had the assistance of a psychological expert and fails to prove an Eighth Amendment violation in the testimony of Dr. Quijano. *Barefoot*, 463 U.S. at 901.

19. Applicant is not a juvenile under the age of 18 years and is not exempt from the death penalty. *Roper v. Simmons*, 125 S.Ct. 1183, 1197-98 (2005).

20. Non-errors may not in "their cumulative effect cause error." *Chamberlain v. State*, 998 S.W.2d 230, 238 (Tex. Crim. App. 1999).

21. Instances of no deficient performance may not in their cumulative effect cause error. *See Chamberlain*, 998 S.W.2d at 238.

22. Applicant's death sentence was lawfully imposed.

RECOMMENDATION

It is the recommendation of this Court that the relief requested by Applicant be ***denied***.

ORDER

The Clerk of this Court is ordered to certify (1) a copy of the indictment, judgment, and sentence in the primary cause; (2) a copy of all filings relating to this application for writ of habeas corpus including the State's answer; and Applicant's motions made after the State's answer was filed, the State's responses to those motions, and the Court's rulings; (3) a copy of

the Court's order dated July 19, 2005, and the proposed findings of fact and conclusions of law submitted by the parties; (4) a copy of this finding of facts and conclusions of law, recommendation, and order, and send them to the Texas Court of Criminal Appeals; and to send a copy of this finding of facts and conclusions of law, recommendation, and order to John Wright, attorney for Applicant, and the State.

SIGNED ON THIS THE 22 day of August 2005.

/s/ Suzanne Stovall
Judge Presiding
221st District Court
Montgomery County, Texas

[CORRECTED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-70017

MICHAEL JAMES PERRY,

Petitioner-Appellant

versus

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

- - - - - - - - - - - - - - - -

Appeal from the United States District Court
for the Southern District of Texas at Houston

- - - - - - - - - - - - - - - -

ON PETITION FOR REHEARING EN BANC

(Filed May 8, 2009)

(Opinion 3/11/09, 5 Cir., ____, ____ F.3d ____)

Before JONES, CLEMENT, and SOUTHWICK, Circuit Judges.

PER CURIAM:

(x) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel

Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge

REHG-6A

My name is Victor Dean Neal. I am twenty-four years of age. My date of birth is [Redacted]. My Social Security number is [Redacted]. In late 2002, I met with three prosecutors at the residences of Michael & Esther Pond in Cold Springs, TX. The three prosecutors were David Bluestein, Robert Bartlett and a woman whose first name was Heather. They talked to me about testifying in the trials of Jason Burkett and Michael Perry. They told me that I would have to testify in both cases because I had lived with both Jason and Michael. After that initial meeting, I continued to communicate with them. I also went to their offices several times. Right before the first trial, Perry's case, one of the prosecutors brought up the topic of immunity. They told me that whatever I testified to could not be used against me. They specifically told me that I would not be prosecuted for murder. I was also told that I would not be prosecuted in a particular burglary case. No one put our agreement in writing. I just understood that I would not be prosecuted for any of the three murders that Jason and Michael were charged with.

V.N. V.N.

I, Victor Dean Neal, have read this statement consisting of 28 lines. I have initialed all corrections and strikeovers. I swear, and the penalty of perjury, this is the truth.

/s/ Victor D Neal 12/9/04

witnessed by: /s/ Gordon W. Bulla